STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD

INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, LOCAL 18, Charging Party, v. CITY OF GLENDALE, Respondent.	Case No. LA-CE-805-M PERB Decision No. 2694-M February 3, 2020

Appearances: Schwartz, Steinsapir, Dohrmann & Sommers by Daniel E. Curry, Attorney, for International Brotherhood of Electrical Workers, Local 18; Liebert, Cassidy & Whitmore by Adrianna E. Guzman, Attorney, for City of Glendale.

Before Banks, Krantz, and Paulson, Members.

DECISION

KRANTZ, Member: This case is before the Public Employment Relations Board (PERB or Board) on exceptions to a proposed decision by an administrative law judge (ALJ). The ALJ concluded that Respondent City of Glendale (City) violated the Meyers-Milias-Brown Act (MMBA)[1] sections 3503, 3505, 3506, and 3506.5, subdivisions (a), (b), and (c), and PERB Regulation[2] 32603, subdivisions (a), (b), and (c), by: (1) deciding to subcontract bargaining unit work without first affording

[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.

Charging Party International Brotherhood of Electrical Workers, Local 18 (IBEW or Union) notice and an opportunity to meet and confer over the decision and the effects thereof; and (2) unilaterally imposing terms and conditions of employment that were regressive and not reasonably comprehended within the City's final proposals, as well as unilaterally imposing other terms that cannot be lawfully imposed. The ALJ dismissed all other claims against the City, finding that there was insufficient evidence to establish that: (1) the City retaliated against bargaining unit employees because of their protected activities; (2) the City engaged in bad faith bargaining during negotiations for an initial memorandum of understanding (MOU); or (3) the City failed to participate in good faith in MMBA factfinding procedures. Each party filed voluminous exceptions. Cumulatively, the parties' exceptions ask us to review virtually all of the ALJ's findings.

We have reviewed the entire administrative record and have considered the parties' exceptions and responses in light of applicable law. The record largely supports the ALJ's factual findings with several exceptions, which we correct below. We also adjust the ALJ's legal conclusions and remedial order, as needed to comport with PERB precedent. In one such adjustment, we find that the City engaged in bad faith bargaining that prevented the parties from reaching a legitimate, good faith impasse during first contract negotiations. As a result, whereas the proposed order would have voided the City's imposition of certain new employment terms and left other aspects of the City's imposition unchanged, our conclusion that the City engaged in bad faith bargaining means that it did not have the right to impose any new employment terms, and we therefore adjust the remedy to cover the City's imposition

in its entirety. While this adjustment expands the remedial order in one respect, we also limit the remedial order in other ways, as explained herein.

PROCEDURAL HISTORY

IBEW initiated this action by filing an unfair practice charge against the City on October 8, 2012, and twice amended the charge, on April 3, 2013 and July 1, 2013. The City provided position statements in response to the charge allegations on November 26, 2012, June 7, 2013, and August 13, 2013. On October 23, 2013, PERB's Office of the General Counsel (OGC) issued a complaint against the City. The City filed its answer to the complaint on November 15, 2013, denying the material allegations and raising numerous affirmative defenses.

The parties engaged in a formal hearing before the ALJ on 23 days over a nine-month period between March 17, 2014, and November 24, 2014. The formal hearing was lengthy because it covered an array of allegations. First, IBEW claimed that the City, in deciding to subcontract work performed by bargaining unit Underground Distribution Construction Mechanics (UDCMs), implemented a unilateral change without bargaining in good faith and retaliated against the bargaining unit's protected activities.[3] Furthermore, IBEW claimed that the City: (1) engaged in bad faith bargaining while negotiating with IBEW for a first contract (both by subcontracting UDCM work and by other conduct); (2) failed and refused to engage in post-impasse factfinding; (3) implemented new employment terms without first reaching a legitimate,

[3] The complaint initially identified four named UDCMs as having been subject to an alleged retaliatory layoff. On the first day of hearing, the ALJ granted IBEW's motion to amend the complaint to allege that the City laid off all 16 bargaining unit employees in the UDCM and UDCM supervisor classifications in retaliation for protected activities.

good faith impasse and exhausting post-impasse procedures in good faith; (4) implemented regressive terms not reasonably comprehended in the City's final proposals; and (5) unilaterally imposed other terms that cannot be lawfully imposed under any circumstances.

After the ALJ approved a series of requests by both parties to extend the post-hearing briefing schedule, the parties submitted closing briefs on September 14, 2015. The ALJ issued a proposed decision on June 29, 2017. Thereafter, the Board granted a series of unopposed requests to extend the exceptions and cross-exceptions filing dates, and the case was ultimately submitted to the Board on August 23, 2018.[4]

FACTUAL FINDINGS

I. Background

The City is a "public agency" within the meaning of MMBA section 3501, subdivision (c), and PERB Regulation 32016, subdivision (a). IBEW is an "exclusive representative" within the meaning of PERB Regulation 32016, subdivision (b). IBEW represents a unit of employees working within the Glendale Department of Water and Power (GWP).

A. GWP's Budget and Operations

GWP is a City department known as an "enterprise fund." An enterprise fund is a government-owned organization that is in the business of supplying services to the public at established rates. If costs exceed revenues in an enterprise fund, the City

[4] On October 10, 2018, IBEW requested that the Board expedite its final decision in this matter. The City opposed the request. In light of IBEW's numerous requests for extensions of time to file a response to the City's exceptions and to file cross-exceptions, we deny IBEW's request to expedite. (PERB Reg. 32147.)

can increase customer rates. The City Council, which approves rate increases and has oversight over all of GWP's operations, typically approves rate increases approximately every four to five years. The City Council denied a requested electricity rate increase in 2012, but the next year approved an increase effective September 1, 2013.

GWP separately maintains a Water Fund and an Electric Fund. For decades, the City Charter has required that GWP transfer a portion of the Electric Fund's operating revenues to the City's General Fund budget. Director of Finance Bob Elliot (Elliot) testified that in each of the last several years prior to the formal hearing, including 2012, the City Council had transferred approximately 10 to 12 percent of the Electric Fund's operating revenues to the City's General Fund. In 2012, the transfer was just under $21 million; in the preceding year, it was approximately $19 million. The Electric Fund transfer typically represents approximately 10 to 15 percent of the City's overall revenues in the General Fund.[5]

GWP Chief Assistant General Manager Ramon Abueg (Abueg) begins to develop GWP's annual budget in early spring, by meeting with engineers and other field staff to determine what work GWP needs to accomplish the following fiscal year. Abueg then submits a preliminary estimate of costs to the General Manager. After the General Manager approves the department's estimate, the City's Department of Finance works on a preliminary budget in April and May, and develops the final

[5] Elliot explained that privately-owned utilities must pay a franchise tax to the cities in which they operate, and thus the transfer of funds from the Electric Fund to the General Fund "is meant to mirror what a franchise tax would equate to as a benefit of the City being the owner of the utility. You can also view it as a dividend of owning the utility and having it operate within the City."

version for presentation to the City Council by June 1. The City Council typically adopts the final budget during the last of week of June.

B. Work Performed by UDCMs

At all times leading up to the facts of this case, the UDCM I, UDCM II, and UDCM Supervisor I classifications (collectively, UDCMs or UDCM classifications) were responsible for installing and maintaining the underground electric substructure, i.e., thoroughfares for underground electrical power to get from one point to another. The substructure is made up of vaults, which are underground concrete rooms that house electrical equipment; pull boxes, which are smaller underground containers housing electrical switches and other equipment; and conduits, which are PVC pipes that hold electric cables. Some UDCMs operated heavy construction equipment necessary for installing vaults and conduit and digging the trenches necessary for that work. In addition to construction work, UDCMs performed minor vault repairs and certain inspections.

UDCMs did not directly work with electricity or install electric components. Other GWP classifications, including Station Electrician and Station Electrician/Operator, performed maintenance and new installations of electrical equipment on substations, which are above-ground structures described by Abueg as "the source of the electricity." Electrical Line Mechanics, who work both above and below ground, were responsible for installing and maintaining the electrical components housed inside the vaults and for inspecting the vaults for safety issues each time they entered. Suspected structural safety issues were reported to the GWP

Engineering Department, which determined the maintenance status of the vault and directed necessary repairs.

Depending on the nature of the project, UDCM work was budgeted from either GWP's Maintenance and Operations budget or Capital Project (construction) budget. The Capital Project budget was funded from either bond or operating revenues. UDCMs also worked on customer-paid projects, where private property owners requested that the City provide the utility substructure work necessary to support their electrical systems. The private parties reimbursed the City for this work.

UDCMs often opened public streets as part of their below-ground construction work. Other City departments, like Public Works, also were routinely required to open public streets. To minimize disruption to the public, once a street is opened for construction work, the City imposes at least a five-year moratorium before the street can be reopened. For this reason, City-owned and private utilities, such as electric, water, gas, telephone, and cable, try to coordinate with each other to perform any necessary utility upgrades when a street is opened for a construction project. The City also has a holiday moratorium on street construction, so that any street construction must be completed or halted before the Thanksgiving holiday around the Galleria and Americana malls, the City's busy shopping areas.

II. IBEW Organizing at GWP

IBEW began an organizing campaign among GWP employees in 2010. At that time, GWP employees, including those performing UDCM work, were included in a City-wide bargaining unit represented by the Glendale City Employees Association (GCEA). Martin Marrufo (Marrufo), IBEW Assistant Business Manager, and Gus

Corona (Corona), IBEW Senior Assistant Business Manager, were the primary IBEW organizers who met with GWP employees during the organizing campaign. Michael Lawrence (Lawrence) was employed as a UDCM Supervisor I, a bargaining unit position. Lawrence was one of several employees who collected employee support cards for IBEW.[6]

On November 24, 2010, IBEW submitted a Petition for Unit Modification and Representation to the City, which sought to sever approximately 54 GWP classifications from GCEA's general bargaining unit. On January 11, 2011, a unit determination hearing took place at City Hall. More than 60 employees attended to show support for IBEW. The City acknowledged that employee support for IBEW was strong among GWP employees—around 95 to 98 percent. According to City Human Resources (HR) Director Matthew Doyle (Doyle), it was common knowledge among City management that many employees had expressed high hopes for IBEW's ability to obtain more favorable contract terms for the new unit.

On April 18, 2011, the City formally recognized IBEW as the exclusive representative of the new GWP bargaining unit (Unit 40), including the UDCM classifications.

III. First Contract Bargaining

Bargaining for an initial contract between IBEW and the City commenced in June 2011 and continued through the summer of 2012.

[6] Lawrence's son, Joseph Lawrence, was also employed at GWP as a UDCM. Joseph Lawrence is referred to by his full name.

A. Negotiations from June 2011 to March 2012

The parties first met to negotiate on June 13, 2011, and thereafter participated in 21 bargaining sessions between that date and July 11, 2012. Corona and Marrufo were the IBEW lead negotiators. Lawrence also participated on the IBEW negotiating team; he was the only UDCM on the team. Five additional unit employees, including Station Electrician James Griggs (Griggs), rounded out the IBEW negotiating team. The City's bargaining team included its counsel, Richard Kreisler (Kreisler), Assistant City Manager Yasmin Beers (Beers), Doyle, Elliot, Abueg, HR Analyst Rosie Akopyan (Akopyan), and several others.

The City's overarching approach to these negotiations and its contemporaneous negotiations with other City bargaining units was informed by significant General Fund budget deficits in consecutive years—$10 million in 2010, $18 million in 2011, and approximately $15.4 million in 2012. The City had a policy to hold in reserve a minimum of 30 percent of its General Fund. Elliot explained why the City did not resolve its deficit by taking money from its reserves:

> "We could have, but that's not the direction the Council gave us . . . the reserve is for that true rainy day when you have an earthquake or some other disaster that may wipe out your taxpaying base."

The City explained to IBEW that the deficits, combined with the reserves policy, required it to refuse wage increases and seek concessions from all employee groups. IBEW believed that its employees need not agree to the same concessions that the City was demanding from other employee groups, because IBEW-represented employees were part of a revenue-generating enterprise, and employees could easily be recruited to outside companies or other public entities if not compensated

sufficiently at the City. IBEW noted that if progress was made on non-economic issues, such as binding arbitration in exchange for a no-strike provision, then it was prepared to be more flexible on economic items. The City remained opposed to IBEW's binding arbitration proposal throughout negotiations, preferring the grievance procedure contained in the City's Employee Relations Ordinance (ERO), with the City Manager having the final say regarding all grievances.

IBEW presented its first comprehensive MOU proposal at the second bargaining session, on July 11, 2011. The proposal did not yet include wage provisions, and the City objected to what it believed to be "piecemeal" bargaining. The City made its initial comprehensive MOU proposal at the third session, on July 20, 2011, offering no wage increases and proposing that employees pick up 100 percent of medical premium increases effective July 1, 2011. IBEW made its second comprehensive MOU proposal on August 24, 2011, stating that a wage proposal would follow. On October 6, 2011, IBEW proposed a 4 percent wage increase retroactive to July 2011 and a salary survey of other public and private utilities to trigger potential further wage increases in the second and third years of the proposed MOU. IBEW also proposed a 75/25 split of increased medical premiums, with employees paying 25 percent of the increases.

On October 27, 2011, the City presented its second written proposal and shared its costing analysis of IBEW's proposals. The City determined that IBEW's proposal would cost the City $1.5 million in the first year. The City explained that it had no interest in conducting salary surveys, as the amounts paid to employees by other cities was of little concern to the City Council, and it had no room to increase

wages in any event. The City proposed increasing employees' pension contributions from 0.5 percent to 2.5 percent, or, in the alternative, a 1.75 percent decrease to base wages.

On November 18, 2011, the City presented its third written proposal, still offering no wage increases. On December 21, 2011, IBEW moved slightly toward the City's position on medical premiums, offering a 70/30 split, with employees paying 30 percent of the increase.

On January 19, 2012, the City made its fourth written proposal in which it again offered no wage increases. On February 14 and March 13, 2012, IBEW offered written proposals, but it did not move off its prior wage proposal at that time. At each of those sessions, the City's bargaining team asked if IBEW's wage proposals were its best and final. IBEW's representatives responded that the Union still had room for movement on wages. IBEW's March 13, 2012 proposal again moved slightly toward the City's position on cost sharing for medical benefits, offering a 65/35 split.

On March 29, 2012, the City presented a proposal it identified as its Last, Best, and Final Offer (March 29 proposal). The March 29 proposal incorporated a number of tentative agreements that the parties had reached during the course of negotiations and withdrew proposals opposed by IBEW regarding overtime and apprentice retention. The proposal contained the same economic concessions previously demanded: no wage increase; a 2 percent increase in employee pension contributions (resulting in a total 2.5 percent employee pension contribution), or, in the alternative, a 1.75 percent base wage reduction; and employees to pay 75 percent of medical premium increases. Paragraph 20 of the March 29 proposal, entitled "Impasse

Procedures," stated: "In the event that this Last, Best and Final Offer does not result in a ratified agreement, the parties shall be at impasse. The City proposes that any necessary impasse process be confined to the submission of the dispute directly to the City Council for its resolution." According to its terms, the March 29 proposal "remain[ed] valid through and including April 10, 2012" or the completion of the Union's ratification process. Thereafter, IBEW put the City's March 29 proposal to a membership vote; the members unanimously rejected it.

B. Negotiations from April to July 2012

On April 10, 2012, Corona sent Doyle a letter informing him that the bargaining unit members had rejected the City's March 29 proposal. Corona stated: "IBEW does not agree that the parties are at impasse and requests that the City further negotiate with the Union to resolve the remaining differences." Doyle responded to Corona by letter dated April 17, 2012 stating: "In order to allow the City to evaluate the Local 18 claim that the parties are not now at impasse, the City is agreeable to scheduling at least one additional meeting. Further assessment of the status of the parties can better be made at the conclusion of that meeting." The letter closed by offering dates to meet. The parties scheduled a meeting for May 9, 2012.

The City opened the May 9, 2012 session by asking IBEW to explain why it took the position that the parties were not at impasse. IBEW responded by presenting a written proposal which modified its previous wage proposal. Instead of a 4 percent increase in the first year and adjustments based on a salary survey in the second and third years, IBEW proposed to tie any annual increases—in all three years—to salary survey results. Thus, depending on the results of the survey, some classifications

may have received no raises at all. In modifying its wage proposal in this manner, IBEW sought to address two City concerns. First, by proposing to link any increases to classification-specific market conditions, IBEW addressed the City's concern that if it agreed to a general wage increase with the IBEW-represented unit, it would be required to reopen wage articles in its other bargaining units' contracts. Second, IBEW believed its proposal was not as expensive for the City, since its prior proposal had both market-adjustments and across the board increases and its new proposal had only market adjustments.

IBEW also made other movement toward the City's positions. With respect to medical premiums, IBEW moved from a 65/35 employer/employee split to a 50/50 split. Additionally, IBEW agreed to City proposals to increase certain specialty pay rates and withdrew its own proposals regarding certain other specialty and premium pay adjustments. The parties scheduled another meeting for June 20, 2012.

At the June 20 session, the City presented a new written proposal, titled as an "Impasse Related Settlement Proposal." The proposal included a preamble noting that the City considered an impasse to have existed upon the Union members' rejection of the City's March 29, 2012 proposal, and it stated, "thus an impasse then existed and continues to exist." The City asserted that the purpose of its new proposal was to "address whether or not the existing impasse can be resolved by means of an agreement." The City's proposal moved toward IBEW's position in four primary respects:

- "The City increased the term of the agreement from one year to two years;

- "The City proposed that employees pay an additional 1.5 percent of their pay toward pension costs, rather than its prior proposal that employees pay 2.5 percent (or, alternatively, a 1.0 percent base wage reduction, down from its prior alternative proposal that employees accept a 1.75 percent base wage reduction);

- "The City accepted the Union's proposal of a 50/50 split for increased medical premiums, thereby moving off the City's prior proposal that employees contribute 75 percent; and

- "The City dropped its proposal regarding stand-by assignments and accepted IBEW proposals regarding wage differentials in the Stations Maintenance Group and release time for union business."

The City's June 20, 2012 proposal also stated: "In the event that this impasse-settlement proposal does not result in a ratified agreement, the parties shall continue to be at impasse," and that the proposal would remain valid until July 3, 2012, or until IBEW completed a ratification vote. IBEW disagreed that the parties were at impasse. The City indicated that it expected a counterproposal from IBEW. The parties then scheduled a bargaining session for July 11, 2012.

At the July 11 meeting, IBEW presented a counterproposal that moderated its position on an incentive pay issue and indicated tentative agreements with the City on a handful of other issues, including the 50/50 split on medical premium increases, and 75 hours of union business leave. The parties remained apart over the City's proposal to increase employee retirement contributions and IBEW's proposal for potential wage increases based on salary surveys. The parties discussed impasse resolution procedures. IBEW proposed that the parties follow statutory impasse-resolution

procedures under the MMBA, as amended by Assembly Bill 646.[7] The City indicated that it would not expect IBEW to waive its statutory impasse procedure rights, and that there may be a tentative agreement on impasse procedures. Kreisler stated that the Union's latest proposal was not very different from the one it had made on May 9, especially regarding wages.[8] The City's negotiators nonetheless closed the meeting by telling IBEW that they would present IBEW's proposal to the City Council at some point and contact IBEW "as appropriate."

C. Follow-up E-mails in August and September 2012

Between August 7 and September 12, 2012, Corona and Doyle exchanged multiple e-mails, with Corona lamenting that a significant amount of time had lapsed without any response from the City regarding IBEW's last proposal. In response to Corona's August 12, 2012 e-mail asking when the Union could "expect[ ] some sort of response" to its July proposal, Doyle wrote that "[w]e probably need a few more weeks. We've had one opportunity to meet with the City Council [on July 24] since our last

[7] Assembly Bill 646's dispute resolution provisions are codified at Government Code sections 3505.4 and 3505.5. The City's ERO contained no dispute resolution provisions.

[8] During the summer and fall of 2012, the City reached agreement with GCEA, Glendale Police Officers Association (GPOA), Glendale Fire Fighters Association (GFFA), and Glendale Management Association (GMA). All of those employee groups agreed to increase employee wage deductions by 3 to 3.5 percent, without offsetting wage increases, as a concessionary pension cost-sharing measure. Additionally, GPOA agreed to concessions regarding overtime pay, a 2 percent wage reduction, and to require employees to pay 100 percent of increased medical premiums. GFFA agreed to further delay, until 2013, a 4.5 percent wage increase that was originally slated to take effect in 2009.

negotiation session and were unable to come to any firm conclusions on our next steps."

After further follow-up communications from Corona, Doyle stated on September 11, 2012 that the City's failure to respond to IBEW's July 11, 2012 proposal did not indicate a refusal to bargain in good faith. Doyle noted that since the parties' last bargaining session, the City had been occupied by a number of tasks, including: a reclassification plan that had to be approved by the City Council and the Civil Service Commission; processing of 122 employees taking a retirement incentive; serving 50 layoff notices and calculating bumping rights; and finalizing MOUs with GFFA, GPOA, GMA, and GCEA. Corona replied to Doyle's e-mail on September 12, 2012, stating that IBEW had been "more than patient but at some point this needs to get resolved." Corona asked Doyle to provide him with a date by which to expect a proposal back from the City, so that IBEW could make its own "firm conclusion" regarding steps the Union needed to take. Doyle did not respond to that e-mail.

At the September 18, 2012 City Council meeting, IBEW protested the City's lack of response to the Union's July 11, 2012 bargaining proposal. City Manager Scott Ochoa (Ochoa) stated that the City was "continuing to evaluate the [Union's] proposal."

Months later, in April 2013, in internal management e-mails, Doyle referred to the above-described e-mails with Corona as "the series of e-mails Gus sent to me last fall about the status of negotiations, where we had to keep stalling them" regarding the status of negotiations. Doyle testified that he did not mean that the City was intentionally stalling, rather that the delay came from the other events that Doyle had

written about in his e-mail to Corona on September 11, 2012, and which had prevented the City Council from giving direction to the City's negotiators.

IV. Elimination of the UDCM Classifications[9]

A. Fall 2012 Layoffs and Subcontracting of UDCM Work

In 2010 and 2011, the City laid off employees outside Unit 40, due to budget shortfalls. In August 2012, as a result of continuing shortfalls, the City laid off approximately 50 management and mid-management employees.[10] As part of these layoffs, GWP reduced six assistant general manager positions down to just two positions.

In May 2012, Steve Zurn (Zurn) took over as GWP General Manager upon former General Manager Steiger's retirement. Zurn reviewed GWP's finances and

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[9] The parties have generally referred to the elimination of the UDCM classifications as a "layoff," even though in some cases the end result was involuntary demotion in lieu of layoff. Moreover, we note that the City's decision to eliminate all UDCM positions actually was based upon both a non-bargainable decision to reduce the amount of overall construction and associated UDCM work being performed on behalf of the City, at least temporarily, and a bargainable decision to subcontract and to use non-Unit 40 City employees to perform remaining and future UDCM work. (*Fire Fighters Union v. City of Vallejo* (1974) 12 Cal.3d 608, 621 [layoffs not negotiable to the extent they result solely from a decision that fire prevention force is too large, but such layoffs are negotiable if the work of the laid off employees is still being done, but the employer has decided to use non-unit employees to perform it].) In this decision, we are careful to remedy only those layoffs and involuntary demotions resulting from bargainable decisions. To ensure we do not provide a remedy for any layoffs or demotions that would have occurred solely based on the non-bargainable decision to reduce (at least temporarily) the amount of UDCM work performed, we have adjusted the ALJ's proposed remedial order by limiting it to remedying harms caused by the City's bargainable decisions.

[10] The City also laid off employees in the Community Development department as a result of losing state and federal redevelopment funding.

discovered what he believed to be more serious financial problems within the department than the City had previously acknowledged. The Water Fund had a $21 million budget deficit, and in 2012 the Electric Fund had $16 million in overall operating losses, accounting for the charter-required transfer from the Electric Fund to the City's General Fund. Before his retirement, Steiger had determined that the Capital Projects budgets for both the Water and Electric Funds should have no expenditures for the 2012-2013 fiscal year because of significant deficits in the overall GWP budget. Zurn further addressed GWP's budget deficit by limiting warehouse administrators' purchasing and supply procurement, instituting a hiring freeze, and eliminating the use of several outside consultants.

Zurn testified that he made the decision to implement layoffs in late July 2012. Zurn discussed the potential layoffs with Abueg, who in turn consulted with several supervisors. Zurn testified that all UDCM positions could be eliminated because they were not "mission critical" to the delivery of electrical services, in that they do not respond to GWP residential and business customer power outages, and because there was not enough consistent work at the time to justify maintaining the positions. Abueg, however, recalled the timing differently, testifying that "[e]ven back in August 2012, we didn't know we were going to do the layoffs."[11] Doyle and Ochoa were involved in layoff discussions with Zurn.

In late June 2012 the City Council adopted a 2012-2013 budget that included funding for 17 UDCM positions. The City ultimately eliminated all UDCM positions in

[11] The ALJ noted, but did not resolve, this discrepancy. We, too, find no need to resolve it, since it would not impact the outcome.

October 2012.[12] Zurn testified that there was no particular event precipitating the City's decision to lay off the UDCMs. Elliot noted that there was no financial emergency between June and October 2012, but rather GWP was looking for ways to cut costs. Furthermore, when the City Council adopted the 2012-2013 budget, the City did not know the exact amount of savings that would be derived from early retirements.[13]

In approximately September 2012, once Zurn informed Doyle of which IBEW-represented positions would be laid off, Doyle assigned HR Administrator Aymee Martin (Martin) to analyze the identified employees' bumping rights. Martin utilized the City's Civil Service Rules and the City's Layoff Policy to determine whether employees identified for layoff were eligible to bump into positions they may have previously held. Several of the UDCM incumbents identified for layoff had bumping rights to previously-held positions, all at lower rates of pay than the UDCM classifications.

On October 3, 2012, Doyle sent IBEW a letter notifying it of the City's intent to lay off unit employees seven days later, on October 10, 2012. The letter stated that 25 bargaining unit positions would be eliminated, and that because of the seniority-based bumping process, up to 28 positions could be affected. The reduction in force

[12] Although 17 UDCM positions were budgeted in June 2012, by the beginning of October 2012 one UDCM had resigned, leaving only 16 incumbents in UDCM positions.

[13] In May 2012, after reaching agreement with GCEA and GMA, the City offered an early retirement incentive to employees represented by those employee organizations. In September 2012, the City reached agreement with IBEW over a retirement incentive, and then offered that incentive to IBEW-represented employees, with an enrollment period between September 25 and October 12, 2012.

was necessary, Doyle explained, due to a $10.8 million shortfall in the Electric Fund for the 2012-2013 fiscal year. Doyle continued, "we see no alternative other than an immediate scale-back of all existing Capital Projects in the Electrical Section, thus requiring less staff, primarily in construction and substructure work." In explaining the elimination of the UDCM series,[14] Doyle stated:

> "[T]he Underground Distribution Construction crew will be eliminated as their work is predicated on having funds available for Capital work. The substructure work for Capital Projects can be provided on an as-needed basis by qualified contractors at a lesser cost than maintaining full-time staff, especially during slow construction periods. From time-to-time, small non-high-voltage work will be supplemented with other city-workers that have similar qualifications."

The letter closed by offering the City's availability for effects bargaining with IBEW.

On October 4, 2012, IBEW responded to the City's October 3, 2012 letter by demanding that the City immediately rescind its decision until it bargained in good faith with the Union. IBEW demanded bargaining over both the decision and effects of the City's decision. IBEW characterized the seven-day period between notice of the layoffs and the layoffs themselves as "patently unreasonable and inadequate to allow for meaningful bargaining."

The City agreed to bargain over the effects of its decision but refused to negotiate over the decision itself. The parties met six times between October 8 and November 14, 2012, to negotiate over the effects of the City's decision. The City

[14] The letter stated that GWP would lay off the Line Mechanic Apprentices as well, but the City later rescinded that decision.

repeatedly assured IBEW that it would meet and confer with the Union before subcontracting work that would have been performed by the UDCM crews. Nevertheless, as noted above and discussed further *post*, the City had already determined at the time it announced the UDCM layoff that remaining and future work which had been performed by UDCMs would henceforth no longer be performed by Unit 40 employees.[15]

On October 10, 2012, the City issued layoff notices to all UDCM employees. Thereafter, the City then offered lower-paid positions to many UDCMs. Certain UDCMs who were offered these lower-paid positions accepted the City's offer, while others declined. Some of the UDCMs who were eligible for early retirement availed themselves of that program. The City placed laid off UDCMs on paid administrative leave as of October 10, 2012, even though their last day of paid employment with the City was to be November 15, 2012. After eliminating the UDCM positions, GWP transferred the construction equipment which had been used by the UDCMs, such as backhoes, Bobcats, and rollers, to the Public Works department.

B. The City's Explanations for Eliminating the UDCM Classifications

The City fully eliminated the UDCM classifications, though not before noting an alternative option would have been to retain some of the UDCMs to perform certain remaining work. The record is replete with evidence that the City was motivated by substantial budgetary considerations as well as retaliatory motives. We first detail the

[15] We use the phrase "remaining and future work" partly because, if and when the total amount of UDCM work began to rebound after initially being reduced, the status quo ante would have involved recalling UDCMs who had been laid off for lack of work, yet the City did not do so and did not provide an opportunity to bargain about its decision to refrain from doing so.

budgetary reasons, before turning to the evidence of discriminatory animus. The budgetary motives are relevant for three primary aspects of our analysis: (1) The City relies on its budgetary motives as a non-discriminatory rationale to defend against IBEW's retaliation claim; (2) Budgetary motives led the City to reduce, at least temporarily, the amount of UDCM work the City was performing, meaning that this temporary reduction in services was a non-bargainable management prerogative; and (3) Budgetary motives also formed a significant part of the basis for the City's decision to use non-Unit 40 employees for remaining and future UDCM work, which means that the decision to use non-unit employees was bargainable, as cost concerns are a quintessentially bargainable topic.

1. The City's Budgetary Motives

The decisions at issue in this case saved the City money in two primary ways. First, the City saved money by scaling back, at least temporarily, the amount of capital work it was performing, including UDCM work associated with capital projects. Second, the City saved money by subcontracting UDCM work for its remaining and future capital projects as well as by using non-Unit 40 employees instead of UDCMs to perform vault repairs, inspections, and customer-paid service connections.

In a September 14, 2012 e-mail to Zurn and Doyle, Abueg noted that "[o]ne option we may consider is to keep one [UDCM] crew. They can be assigned non-Capital work such as minor vault repairs, [and] customer paid service connections." Doyle responded, "[t]hat might be a little more defensible, so long as we've got the work." No e-mail response from Zurn is in the record, and he did not testify about this e-mail exchange. Abueg testified that keeping one UDCM crew employed was not

ultimately pursued because “it was a matter of budget,” even though Zurn testified that there was ongoing work. And Zurn acknowledged this when he told IBEW that future vault repair and inspection work “could be done by going outside of the unit.”

The City performed a limited amount of capital projects in 2012-2013, using subcontractors to perform all UDCM work associated with such projects that year and thereafter. The City thus implemented its plan, laid out in its October 3, 2012 letter, to use subcontractors instead of UDCMs for future capital project work at “a lesser cost” to the City. The City’s projection that it would save money was based on research it conducted in 2012. Abueg directed his engineers, well before the layoffs were announced in October 2012, to obtain “informal” estimates from private contractors for substructure work which had already been completed by UDCMs, in order to compare what those costs would have been had the City used private contractors. Abueg testified that he asked for these estimates because “a lot of the work that was being done by the UDCMs were exceeding both budget and time frame that we scheduled for the work to be done[.]” However, as discussed below, the City’s unilateral action eliminated any opportunity to bargain over these concerns.

The City did not at any time recall laid off UDCMs to perform either maintenance work or work on capital projects.

2. The City’s Alleged Retaliatory Motives

During the period relevant to this dispute, GWP employees frequently engaged in union activities. Multiple former UDCMs wore IBEW t-shirts to work, displayed pro-IBEW stickers, and attended rallies. In addition to a rally before the January 2011 recognition hearing, IBEW held several other rallies at City Hall during the negotiations

period and through fall 2012. Numerous employees attended these rallies, which at times featured up to 150 people. Before City Council meetings, employees in GWP uniforms and/or IBEW attire would chant, march, and display signs with pro-IBEW slogans and phrases like, “all we want is a contract.” Employees would sit together during City Council meetings and show support for IBEW by clapping and cheering when employees or IBEW representatives spoke. When City managers sought to respond, IBEW supporters would often stand up and leave the meeting en masse or otherwise demonstrate or voice their disagreement. Doyle considered these actions to be rude and admitted that City management was quite irritated by this and other behavior by IBEW supporters. Doyle, Zurn, Abueg, and Brian Brown (Brown), Electric Superintendent of Transmission/Distribution, were among the management employees that regularly attended City Council meetings and observed these concerted activities by employees. Abueg could not recall which GWP employees he observed at the rallies, but based on the size of the crowds, he surmised that “all of them” were showing up.

On July 19, 2012, while negotiations were ongoing, Zurn complained in an e-mail to Doyle that employees were refusing to sign-up for standby/on-call duty on evenings and weekends and were refusing overtime, which negatively impacted operations during the time of year most prone to power outages. Zurn also complained that IBEW overstated safety concerns as a means of protesting disciplinary or other actions with which it disagreed. Although Zurn admitted that both GWP and the Occupational Health and Safety Administration investigated and found merit to one of the claims, Zurn maintained his opinion that IBEW’s safety concerns

were exaggerated. At the May 7, 2013 City Council meeting, Zurn described such IBEW actions as "diversionary tactics."

The City's frustration with IBEW is also reflected in other e-mails between managers exchanged during and after the lengthy negotiations period. For example, Doyle once referred to IBEW supporters as "bums," described their presence at City Council meetings as a "mob," and referred to the Union's tactics as "thuggery." Doyle also called Corona an "asshole" and stated that "these assholes are trying to wear us down," in reference to IBEW having filed numerous unfair practice charges against the City. Akopyan, a senior HR employee and member of the bargaining team, referred to IBEW representatives as "idiots." After a particularly contentious meeting, she said, "I hate the IBEW." Ochoa said of IBEW that a "rattlesnake commits suicide."

On July 19, 2012, Akopyan e-mailed Doyle and Zurn regarding an investigation into insubordination accusations by Power Plant managers against Griggs, who was a member of IBEW's bargaining team. The subject line of the e-mail was: "issue w[ith] Power Plant management v. IBEW shop stewards." In the body of the e-mail, Akopyan wrote, "I didn't find any evidence in Mr. Griggs' actions that can be interpreted as insubordination. What I did hear evidence of is the plant management's treating IBEW shop stewards with—I'm going to say 'resentment', rather than the other 'R' word." (Internal quotations in original.) Akopyan testified that the other "R" word she referred to in the e-mail was, most likely, "retaliation."

On July 22, 2012, around the time that Zurn testified he was making the decision to lay off IBEW-represented employees, former GWP Power Plant Superintendent, Pat "Larry" Moorehouse sent Doyle an e-mail warning about a rumor

that IBEW was planning to refuse overtime and standby to pressure the City in negotiations. Doyle responded, in part: "Yeah, these IBEW bums are starting to play their games. Fortunately, there are contingency plans in place. Don't sell the new [City Manager] or Zurn too short. They're strong. Zurn is cleaning house in GWP."

In August 2012, Lawrence received a phone call from an outside contractor that required him and the crew's equipment operator to leave the work site to meet with the contractor. Lawrence and the equipment operator were the only crew members authorized to operate the equipment necessary for that day's task. Accordingly, Lawrence instructed his crew to take their morning break until he returned. The crew then left the yard together to take their break. While Lawrence was meeting with the contractor, he received a call from his supervisor, Foreman II Mike Simmons (Simmons), who told him that Brown happened to come across Lawrence's crew and noticed that they seemed to be on break for 40-45 minutes, longer than the amount of time allotted for a morning break. Lawrence explained the circumstances to Simmons, but the City nevertheless decided to discipline the crew. Simmons made comments to Lawrence that impressed Lawrence as meaning that employees' union activities had motivated the discipline and that the City would fight the Union "tooth and nail" on every issue, including this one. Later in the day, Brown commented about the discipline to UDCM Glenn Glasgow, who was a member of Lawrence's crew: "It's not about you. You just got caught in the crossfire." Lawrence and Corona attended a meeting with Brown and Simmons to receive the crew's discipline. Lawrence said Brown wanted him to sign the discipline document without having an opportunity to provide his side of the story. Corona protested that management needed to hear the

employees' version of events before discipline was imposed. Brown relented, but Lawrence testified that Brown's attitude and demeanor showed that he was not interested in hearing the facts.[16] Ultimately, the City rescinded the crew members' discipline and reduced Lawrence's discipline from a written warning to a verbal warning.

Brown and Electric Line Mechanic Supervisor II Anthony Sylvers (Sylvers) worked together for many years and were friends outside of work. Former UDCMs, including Lawrence, Johnny Vidal (Vidal), Rafael Galeano (Galeano), Tracy Jochimsen, Scott Nisbet, and Eric Bigby, testified that they heard Sylvers more than once remark to employees who were being laid off, "that's what you get for joining the Union," implying that employees were losing their jobs because of their support for IBEW. IBEW raised concern over these statements during effects bargaining, and Abueg was assigned to investigate. Abueg spoke with Sylvers, who denied making the statements, and with three employees who allegedly heard the statements. Abueg could not recall who he spoke with, other than Sylvers, and concluded that Sylvers had done nothing wrong.

[16] Brown could not recall specific details of the meeting other than to note that Lawrence and Corona were upset and argumentative. Brown testified that, at some other time, he had discussed the issue with Lawrence and Lawrence had stated that he was simply following Simmons's instruction, but he would "take the fall" for his crew. Lawrence, who had served as a shop steward when the bargaining unit had been represented by GCEA, said that GWP management had allowed employees and union representatives to present their side of an issue when GCEA was representing the bargaining unit and had always treated disciplinary meetings in a professional manner, unlike this event.

Brown also made comments regarding IBEW's role in the layoffs. Brown commented to Galeano and Vidal words to the effect of, "don't blame us. Blame your Union."

In April 2013, GWP management was considering a cross-training program for Electrical employees working in the Power Plant and the Stations, which was consistent with IBEW's suggestion during effects bargaining that the Station Electrician and Station Electrician/Operator positions were essentially interchangeable. E-mail exchanges between GWP managers in early-April 2013 reflect that some Electrical employees were resistant to the training, viewing it as extra duties, and had stated their intentions to seek advice from IBEW. Zurn forwarded the GWP managers' e-mail exchange to Doyle and Ochoa on April 3, 2013, and wrote to them:

> "This is bullshit! This is where they want to draw the line—then no problem. My budget is thin. [Station Electricians] Griggs and Ball have refused to cooperate and I have been a patient man. The SMR's [Station Electrician/Operators] are just mudding [sic] the waters for IBEW. Griggs and Ball are the only ones in their class. I lay both of them off and then force the SMR's to pick up the slack as they should and as is consistent with other utilities."

Doyle responded to Zurn that before anything was done, a meeting with Marrufo and some of "the boys" (presumably, referring to affected IBEW-represented employees) would be a good idea to explain the merits of the cross-training. Doyle also stated, "I'm not sure punishing Griggs and Ball is the answer if it's the SMRs who are dragging their feet."

Ochoa weighed in on the e-mail exchange two days later. Ochoa stated:

> "Hard pill to swallow. But I think we continue to smile until we implement [terms and conditions of employment]. They want to bait us into an action that they can point to as [a] basis for retaliation, a TRO on the implementation, etc.
>
> "That said, we need to organize all of this bullshit into a single narrative that we can use for Council. I think the complete body of subversive activity gets drowned out by the [meet and confer] issues. Especially for the new councilmember, we need to be able to tell a complete and concise story."

Doyle responded that he agreed with Ochoa, but that the Council had put the City in "an increasingly difficult position by continually delaying the implementation[,]" and noted that when the implementation finally occurred (in May 2013) it would appear to be in retaliation for, among other things, a recent amendment to the instant unfair practice charge. Zurn then responded to both e-mails saying: "No argument here. I was venting. Come on Matt you have [to] deal with high strung execs from time to time! Actually these two guys are a bit untouchable right now. We had our shot at Griggs, and now it would look like retaliation."

V. IBEW Requests Factfinding

After IBEW filed the instant charge, the City filed a responsive position statement in late November 2012, summarizing its perspective on the negotiations and maintaining that the parties had been at impasse since April 2012. The City characterized the parties' negotiations from May through July 2012, including their meetings and proposal exchanges in that timeframe, as unsuccessful attempts to break an impasse that had first arisen in late March. Based on this assertion, IBEW filed a factfinding request with PERB on December 20, 2012, claiming that the November 26, 2012 position statement was the first time the City "expressly and

unequivocally declared that an impasse exists and that further negotiations would be futile." IBEW disagreed that the parties were at a legitimate, good faith impasse, pointing to the May through July 2012 negotiations sessions at which both parties exchanged proposals and moved closer in their positions, and also to the City's still pending promise to respond to IBEW's July 11, 2012 proposal.

On December 21, 2012, the City opposed IBEW's request for factfinding, claiming it was untimely under PERB Regulation 32802, subdivision (a)(2). Specifically, the City argued that the contract dispute was not submitted to mediation, and the request for factfinding did not occur, within 30 days of an alleged written declaration of impasse. The City noted that its March 29, 2012 proposal stated that in the event the proposal was not accepted, an impasse would exist, and the City therefore claimed that an impasse had existed since April 10, 2012, the date IBEW rejected the March 29 proposal.

On December 31, 2012, IBEW responded, adding to its arguments, asserting that even if an impasse existed in April 2012, it was broken by the parties' subsequent bargaining.

On January 4, 2013, OGC denied IBEW's factfinding request, finding it untimely pursuant to PERB Regulation 32802 and MMBA section 3505.4, subdivision (a). IBEW did not appeal.

On January 7, 2013, IBEW submitted its own written impasse declaration to the City. On that same date, IBEW filed a second factfinding request with PERB, based on the Union's impasse declaration. IBEW sought continued negotiations with the City and had only declared impasse in an attempt to avail itself of MMBA factfinding

procedures in the event the City refused to resume negotiations. The City again claimed that IBEW's request was untimely. On January 14, 2013, OGC denied IBEW's second request for factfinding as untimely. IBEW did not appeal OGC's second denial.[17]

VI. The City Refuses to Meet and Implements New Terms and Conditions of Employment

In January and February 2013, with no response from the City regarding its July 2012 proposal, IBEW requested and received release time for its bargaining team. Marrufo sent Doyle an e-mail to thank him for granting the release time and to notify

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[17] Because IBEW did not appeal OGC's determinations regarding the two factfinding requests, we express no opinion as to whether OGC reached a correct result in either instance. We do not fault the City for any arguments it made to OGC as part of those proceedings, nor for any errors OGC may have made in its determinations. No such arguments or possible errors form any part of our findings of bad faith in this matter. We also note that administrative determinations of MMBA factfinding requests do not generally provide either a charging party or a respondent a basis for prevailing in a related bad faith bargaining case. For instance, such an administrative determination does not establish whether there existed a legitimate, good faith impasse permitting an employer to impose the terms of its last offer. (See *City & County of San Francisco* (2014) PERB Order No. Ad-415-M, p. 12 [Although an MMBA factfinding request may involve issues that overlap with those in a related unfair practice case, determinations made as part of the factfinding request generally do "not prejudice or determine the ultimate outcome in the unfair practice case"].) The limited impact of an MMBA factfinding determination is therefore largely consistent with the applicable legal principles under two labor relations statutes that require OGC to rule on a party's request for determination of impasse. (Cf. *Marin Community College District* (1982) PERB Order No. Ad-126, pp. 2-3 [Noting that even though OGC properly considers allegations of bad faith when deciding whether to grant a request for determination of impasse, OGC must reach an administrative determination after a very limited investigation that does not create a reliable evidentiary record like that developed during a formal hearing on an unfair practice charge].) Therefore, we hold that such administrative determinations do not preclude contrary findings after a formal hearing in a related unfair practice charge.

him that IBEW would soon be requesting a meeting with the City. Doyle reminded Marrufo that the parties were at impasse and that the City was not willing to engage in any meetings that "would or could be construed as setting aside" said impasse. Marrufo then responded that IBEW's bargaining team was preparing a proposal for the City that the Union hoped might resolve the impasse. Doyle reiterated that the City was not interested in holding meetings that might be viewed as setting aside the existing impasse.

In late February 2013, Marrufo informed Doyle that IBEW wanted to meet with the City to present a modified proposal. The City was reluctant to hold meetings that might be viewed as breaking impasse. IBEW wanted to present its proposal in a face-to-face meeting, so it could explain the proposal and its rationale. Corona contacted City Council members to urge them to send the City's bargaining team back to the table, but it did not happen.

Unbeknownst to IBEW, around this same time period, City managers were discussing their plans to implement new terms and conditions of employment on the IBEW-represented unit. In a January 23, 2013 e-mail to Ochoa, Zurn, Elliot, Abueg, and Beers, Doyle opined:

> "As I work through this resolution to impose on the IBEW, I truly am struck by how generous our "imposition" will be to them. If we do impose on the June 20, 2012 "settlement impasse" proposal, basically we reduce their salaries by 1%, then give them a bunch of extra pay items, which eats up most of the savings we hoped to arrive at. At the most, I see a savings to the City of around $20,000……hardly a devastating pill for them to swallow. As stated previously, many employees will break even, with some even coming out ahead. (If we imposed the March 29, 2012 last best offer, the savings to the City would be more like $240,000).

> Seriously, if the Council is really going to have heartache over taking $20,000 collectively from this group, we've got bigger problems……"

(Ellipses in original.) Doyle later testified that "in retrospect," after the City had "costed out" its June 20, 2012 proposal, it realized that the savings were too minimal. Doyle did not explain why the City made its June 20, 2012 proposal to IBEW before running its costing analysis.

In response to Doyle's e-mail, Elliot replied, "why don't we just do the March 29th version? That was the true last and best. It also puts us in a better place to start the next round with them." Beers responded, "[a]lthough earlier in the day I was advocating for the June 20th vs[.] the March 29th LBF to Scott [Ochoa], the June 20 settlement proposal really is a gift and it isn't worth the political capital that [City Council] would expend on an implementation."

By letter dated May 2, 2013, the City informed IBEW that at its May 7, 2013 meeting the City Council would consider whether it should take "unilateral action" to resolve the parties' meet and confer process, and that management's recommendation would be to implement the March 29, 2012 proposal. Marrufo immediately sent a text message to Doyle again asking for a meeting "for possible resolution." Doyle responded that he was hesitant to agree to that, because it might create an impression that the parties had reopened negotiations that may "cause delay to the implementation (which we will not do)." Doyle continued: "Unless Local 18 is open to the City's 6/20/12 impasse settlement proposal, then we are not open to a meeting."

In light of the City bargaining team's refusal to meet in person, on May 6, 2013, IBEW delivered a new written proposal to City Council members' offices and to Ochoa and Doyle. Doyle and Ochoa discussed the proposal with each other, but they did not present it to the City Council before the meeting the next day. Doyle did not believe there was time to comply with public meeting notice requirements. In any event, Doyle and Ochoa did not believe that IBEW's latest proposal provided a path to agreement. Doyle testified that the Union's May 6, 2013 proposal continued to seek a wage increase retroactive to July 2011 based on salary survey results. The Union's May 6 proposal, however, no longer sought such a retroactive increase. Rather, it proposed no wage increases in the first two years of the contract, a lump sum payment of 3 percent of base wages in the third contract year, and increases based on a salary survey in years four and five of the contract. The Union modified its position with respect to other terms, as well. For instance, it dropped its demand for binding arbitration and instead proposed that it would agree to a no-strike clause in exchange for non-binding arbitration. It also withdrew all of its special assignment pay proposals to which the City had tentatively agreed. Partially offsetting some of the cost savings in its new proposal, IBEW proposed for the first time that GWP "offer a minimum of 10% overtime to all bargaining unit employees for the duration of the agreement."

On May 7, 2013, the City Council considered management's recommendation that it impose terms and conditions of employment on the IBEW unit. Both IBEW and City management made lengthy presentations to the City Council prior to its vote. Doyle's PowerPoint presentation highlighted the differences between the March 29,

2012 proposal that management advocated to be imposed and management's later June 20, 2012 proposal. The Council then noted the obvious: that the March 29 proposal was less favorable to IBEW than the June 20 proposal. One City Council member opined that it was "a shame" that IBEW had not accepted the City's more favorable settlement offer. The City Council then voted unanimously to impose the terms and conditions in the March 29 proposal on IBEW.

Following the City Council meeting, the City sent IBEW a Notice of Terms and Conditions of Employment imposing the following new terms:[18]

- "Employees' contribution to increased medical premiums: 75 percent (in contrast to the 50 percent offered in the City's June 20, 2012 proposal, which was also the amount paid by all of the other bargaining units);

- "1.75 percent base wage reduction (in contrast to 1 percent base wage reduction offered in the City's June 20, 2012 proposal);

- "Wage differential in the Stations Maintenance Group: 6 percent (in contrast to the City's June 20, 2012 tentative agreement to IBEW's proposed 5 percent);

- "Union release time: 50 hours (in contrast to 75 hours that was offered in the City's June 20, 2012 proposal);

- "Reinstatement of the City's previously-withdrawn (as of June 20, 2012) proposal regarding stand-by pay, which reduced compensation for stand-by assignments;

- "No-strike clause: the City imposed a no-strike clause providing that "the Union and its members agree that

[18] The comparison of the imposed terms to the terms included in the June 20, 2012 proposal is added here and does not appear in the notice of imposed terms and conditions of employment.

there shall be no strike or concerted action resulting in the withholding of service by the members." The provision requires the Union to instruct its members to return to work if they do engage in a strike, and warns if employees do not obey, they will be subject to immediate discharge or other disciplinary action by the City. The no-strike clause additionally prohibits the Union from calling for or condoning any type of work stoppage or slow down, and from encouraging employees to honor the picket lines of other striking employee bargaining units;

- "Waiver of Bargaining Rights: the City imposed the following waiver of bargaining rights: "[other than by mutual agreement in writing], the Union hereby agrees not to seek to negotiate or bargain with respect to any matters pertaining to rates, wages, hours, and terms and conditions of employment covered by the Notice of Terms and Conditions of Employment."

Martin was responsible for drafting the City's imposition document. She testified that the inclusion of the no-strike clause and waiver of bargaining provisions was inadvertent, as that language had been included in the previous GCEA MOU covering the bargaining unit and she had not been instructed to remove it. However, the City took no action to inform IBEW or represented employees that some terms were mistakenly included in the City's notice of imposed terms and conditions of employment.

DISCUSSION

I. Unilateral Changes Regarding UDCM Work

An employer's unilateral change violates the duty to bargain in good faith where: (1) the employer took action to change existing policy; (2) the policy change concerned a matter within the scope of representation; (3) the action was taken without giving the

exclusive representative notice or opportunity to bargain over the change; and (4) the change has a generalized effect or continuing impact on terms and conditions of employment. (*City of Davis* (2016) PERB Decision No. 2494-M, p. 18 (*Davis*), citing *Fairfield-Suisun Unified School District* (2012) PERB Decision No. 2262, p. 9.)

In order to satisfy the first element, a charging party generally must show at least one of the following: (1) changes to the parties' written agreements; (2) changes in established past practices; or (3) newly created policies, or application or enforcement of an existing policy in a new way. (*County of Monterey* (2018) PERB Decision No. 2579-M, p. 10 (*Monterey*); *Pasadena Area Community College District* (2015) PERB Decision No. 2444, p. 12, fn. 12 (*Pasadena Area CCD*); *Davis*, *supra*, PERB Decision No. 2494-M, pp. 30-31.) Here, there is no question that the City changed policy. (*Pasadena Area CCD*, *supra*, PERB Decision No. 2444, p. 12, fn. 12.) Nor is there any doubt that this change had a generalized effect and continuing impact on terms and conditions of employment, inasmuch as "a bargaining unit is adversely affected when a work transfer results in layoffs or the failure to rehire bargaining-unit workers who would otherwise have been rehired." (*Building Material & Construction Teamsters' Union v. Farrell* (1986) 41 Cal.3d 651, 659 (*Farrell*).) As noted elsewhere in this decision, the City did not afford IBEW advance notice and an opportunity to bargain before arriving at a firm decision.

The main dispute in this case involves the extent to which the City's decisions were within the scope of representation, also known as "negotiable" or "bargainable." The ALJ relied predominantly on *Lucia Mar Unified School District* (2001) PERB Decision No. 1440 (*Lucia Mar*) to find that the decision to subcontract certain UDCM

work to outside firms was negotiable, since the City was motivated substantially by a desire to reduce labor costs. The other aspect of the City's decision—transferring certain UDCM work to non-Unit 40 City employees—was also within the scope of bargaining. The parties mainly chose to lump together these decisions, because that is how the City announced them—as a single unified decision. The parties' language choices led to some imprecision, with both parties and the ALJ often referring to both subcontracting and transfer of work using a single shorthand term such as "subcontracting," or other times "transfer of work." The City did not take exception to this blurring of the lines between two somewhat different aspects of the City's decision—subcontracting and transfer of work—and indeed the City blurred these lines in its own arguments. We mainly focus on the City's failure to bargain before subcontracting to outside companies, as that was the City's focus in its exceptions, but we note that the City also failed to satisfy its duty to bargain over its integrally related decision to transfer certain UDCM duties to non-Unit 40 City employees. Hereafter, like the parties and the ALJ, we intend references to the City's negotiable decision to comprise decisions to assign UDCM work to two types of non-Unit 40 employees—subcontracted employees and City employees outside of Unit 40.[19]

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[19] As discussed at footnote 9, *ante*, the City's decision was only non-bargainable to the extent it temporarily stopped performing certain functions altogether. For those functions still performed, precedent is clear the City's decision was equally bargainable to the extent the City began using not only private contractors but also City employees outside Unit 40 to perform some of the traditional UDCM work. With respect to the transfer of certain UDCM work to City employees outside of Unit 40, we reach this conclusion based on extensive precedent holding that such a decision is bargainable if either (i) the work was not historically shared with other classifications outside the bargaining unit, or (ii) the employer decision at issue completely removed the work from the bargaining unit, when in the past it had been

The City argues, first, that the ALJ erred because it decided to subcontract the UDCM work after it decided to layoff all UDCMs. This argument comports with neither the facts nor the law. Over the course of the hearing, Zurn contradicted his own testimony about the timing of the City's subcontracting decisions. We do not credit Zurn's eventual testimony, in which he claimed that the City made its subcontracting decisions only well after eliminating all UDCM crews. Like the ALJ, we find this contradicts Zurn's more credible earlier testimony. The overall record supports an inference that the City decided to subcontract future UDCM work in conjunction with its decision to eliminate the UDCM crews. For instance, the weight of evidence indicates

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shared between employees in and out of the bargaining unit. (See, e.g., *Desert Sands Unified School District* (2010) PERB Decision No. 2092, p. 20; *Calistoga Joint Unified School District* (1989) PERB Decision No. 744, p. 9.) Here, the transfer of work to City employees outside of Unit 40 qualifies as bargainable under both of these tests, independently. We therefore affirm the ALJ's finding that the City violated the MMBA both in subcontracting substructure construction work to private contractors and in transferring other traditional UDCM work to the City's non-Unit 40 employees in Public Works and other departments. The City announced its intention to follow both of these paths in the same October 3, 2012 letter explaining the elimination of the UDCM series. The ALJ specifically remedied the transfer of work as well as the subcontracting, directing the City to restore the status quo that existed prior to the layoff of all UDCM employees and "bargain, upon request, in good faith over proposals to subcontract or transfer bargaining unit work and other matters within the scope of representation." We similarly address both negotiable aspects of the decision in our remedy. In the course of the proposed decision, the ALJ (like the parties) relied mainly on subcontracting precedent but also cited certain transfer of work precedent, such as *City of Sacramento* (2013) PERB Decision No. 2351-M. Although the City could perhaps have excepted to the fact that the complaint used the phrase "subcontracting" and the subsequent litigation was often imprecise in differentiating between subcontracting and transfer of work, the City did not do so and therefore waived any such objection. Moreover, such an objection would have been untenable given that throughout the litigation the City itself contributed to blurring precedent applicable to these alternate aspects of the City's decision.

that the City likely decided to subcontract the Grandview substructure project prior to or by the time of the October 2012 layoff. In spring or summer of 2012, the City prepared design plans for the subcontractor to execute between August and November 2012. Lawrence's supervisor, Simmons, told several UDCMs, including Vidal, that management had stopped the employees' work on the Grandview project because it was going to be less expensive for the City to subcontract that work and the City had decided to do so. Simmons attributed that conclusion to Abueg and Brown. By the time the City had told IBEW about eliminating UDCMs and began effects bargaining in October 2012, the City had already provided plans for the underground substructure work to the contractor and received the contractor's final cost proposal. The City did not reveal this information to IBEW during the effects bargaining discussions. In February 2013, the City Council granted approval to subcontract the remainder of the installation of the substructure necessary to complete the Grandview substation upgrade, but this approval was the logical continuation of the decision already made prior to then. In any event, even were this a separate decision, once again the City did not provide advance notice and an opportunity to meet and confer. Although the City's staff report indicated that one alternative to subcontracting was to have City employees perform the work, the City did not discuss this with IBEW and did not recommend recalling UDCMs or otherwise using City employees to complete the construction, noting that "[d]ue to the recent reduction in staff, GWP does not have the resources to complete this work in a timely manner."

It does not matter that there was a lag between the subcontracting decision and the implementation thereof. Where an employer's change in policy is alleged to

constitute an unfair practice, the operative date for the alleged violation is generally the date when the employer made a firm decision to change the policy, even if the change itself does not take effect until a later date. (*City of Sacramento*, *supra*, PERB Decision No. 2351-M, p. 27; *City of Milpitas* (2015) PERB Decision No. 2443-M, pp. 15-16 [city council's adoption of recommendation to outsource bargaining unit work constituted city's firm decision to contract out].) Like the ALJ, we attribute the lag between the City's subcontracting decision and its implementation of that decision to the City's wait for further funding from sources including unused Water Fund project money, rate increases, and bond sales; we do not find that the lag demonstrated uncertainty regarding the City's decision to use alternative means to cover the work previously done by the laid off UDCMs.

Moreover, even if the City had proven that it made no single decision about how to cover the UDCM work, but instead made a new decision every time it began a project involving work formerly done by UDCMs, this would nonetheless constitute an MMBA violation, since the City has not bargained regarding any allegedly separate or independent decisions on how to cover UDCM work after the layoffs. The City did not provide IBEW with advance notice of such decisions, nor did the City provide an opportunity to bargain before it made firm decisions. For instance, the City did not disclose that it received the contractor's final cost proposal for the Grandview substructure work on November 14, 2012. Indeed, that same day the City told IBEW in effects bargaining that no decisions had been made about the future substructure work, and falsely promised that the City would meet and confer with the IBEW should it seek to have the work performed outside the bargaining unit.

The City also argues that the subcontracting decision fell outside the scope of representation and it therefore had no obligation to bargain over that decision because: (1) the subcontracting decision was not based on labor costs; (2) the City did not "simply replace" its employees with those of a contractor to perform the same services under similar circumstances; and (3) through its bargaining proposals, the Union waived its right to bargain over subcontracting all of the work that was ultimately subcontracted. We turn now to these arguments, while also noting that the City substantially undercut its position by claiming that it would meet and confer with IBEW before subcontracting UDCM work.

A. Framework for Determining If a Decision Falls within the Scope of Representation

Under the MMBA, the scope of representation covers "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." (MMBA, § 3504.) The California Supreme Court has interpreted this provision in a series of cases. (*International Association of Fire Fighters, Local 188, AFL-CIO v. PERB (City of Richmond*) (2011) 51 Cal.4th 259 (*Richmond Firefighters*); *Claremont Police Officers Association v. City of Claremont* (2006) 39 Cal.4th 623; *Farrell*, *supra*, 41 Cal.3d 651; *Fire Fighters Union v. City of Vallejo* (1974) 12 Cal.3d 608.)

In establishing an analytic framework for assessing whether a decision falls within the scope of representation, the Court has explained that MMBA section 3504 was intended to incorporate federal precedent regarding the scope of representation

under the National Labor Relations Act (NLRA),[20] and the Court therefore "has looked to federal precedents." (*Richmond Firefighters*, *supra*, 51 Cal.4th at p. 272.) Specifically, the Court has repeatedly noted that it applies a framework initially deriving from the U.S. Supreme Court's analysis in *First National Maintenance Corporation v. NLRB* (1981) 452 U.S. 666, 676-680 (*First National Maintenance*).

Under this framework, there are three categories of managerial decisions, each with its own implications for the scope of representation: (1) "'decisions that "have only an indirect and attenuated impact on the employment relationship" and thus are not mandatory subjects of bargaining,' such as advertising, product design, and financing; (2) 'decisions directly defining the employment relationship, such as wages, workplace rules, and the order of succession of layoffs and recalls,' which are '*always* mandatory subjects of bargaining'; and (3) 'decisions that directly affect employment, such as eliminating jobs, but nonetheless may not be mandatory subjects of bargaining because they involve "a change in the scope and direction of the enterprise" or, in other words, the employer's "retained freedom to manage its affairs unrelated to employment.'" (*County of Orange* (2018) PERB Decision No. 2594-M, p. 18, citing *Richmond Firefighters*, *supra*, 51 Cal.4th at pp. 272-273.) In the closest cases—the third category of managerial decisions—we apply a balancing test, under which bargaining is required only if "the benefit, for labor-management relations and the collective-bargaining process, outweighs the burden placed on the conduct of the business." (*County of Orange*, *supra*, PERB Decision No. 2594-M, p. 18, quoting *Richmond Firefighters*, *supra*, 51 Cal.4th at p. 273 and *First National Maintenance*, *supra*, 452 U.S. at p. 679.)

[20] The NLRA is codified at 29 U.S.C. section 151 et seq.

B. Analysis of the City's Subcontracting

Given that the above-described scope of representation principles are rooted in NLRA precedent, it is not surprising that our cases applying those principles to subcontracting similarly show significant influence from federal decisions interpreting the NLRA. (*Rialto Police Benefit Association v. City of Rialto* (2007) 155 Cal.App.4th 1295, 1302 fn. 4 (*Rialto*).) Nor is it surprising that California public sector subcontracting precedent, like related federal precedent, is periodically adjusted and refined. (See, e.g., *Folsom-Cordova Unified School District* (2004) PERB Decision No. 1712, adopting proposed decision at pp. 17-18 [tracing part of the evolution of subcontracting decisions under state and federal law, including the shift in focus from requiring unions to establish cost as part of the employer's motivation for subcontracting].)[21]

We have noted that subcontracting, sometimes referred to as contracting out, is "generally within the scope of bargaining." (*Long Beach Community College District* (2008) PERB Decision No. 1941 (*Long Beach*).) Indeed, while subcontracting falls within the third category of decisions under *Richmond Firefighters*, in a majority of cases on this topic we have found subcontracting decisions to be negotiable. Nonetheless, to prevail in showing that the *Richmond Firefighters* balancing test warrants finding a particular subcontracting decision to have been bargainable, an exclusive

[21] To the extent the Board has not always had need to fully lay out this evolution (see, e.g., *City of Milpitas*, *supra*, PERB Decision No. 2443-M, pp. 16-17), we do not interpret such decisions as reverting to an earlier paradigm focused solely on cost motivations. Rather, where one means of establishing a subcontracting violation is established, the Board often has refrained from assessing all possible bases or theories.

representative generally must establish one of three circumstances, which we discuss serially below. While IBEW need only establish one viable theory, in this case it prevails under each of the first two theories.

1. A material portion of the City's concerns were amenable to bargaining

The first means for a union to show that the benefits of bargaining outweigh the costs is to establish that the employer's reasons for subcontracting included, to a material extent, issues that are amenable to bargaining.[22] We agree with the ALJ that the desire to reduce costs overall played a major part in the City's decision-making. Indeed, the City successfully convinced the ALJ to rule in the City's favor, against IBEW's retaliation claim, by proving that the City had an alternative non-discriminatory reason for its actions, which included cost-saving. The City did not except to those ALJ findings, meaning it has substantially waived any argument that cost-savings were not a factor.

Even had the City not waived any arguments, it is clear that GWP management concluded that it could reduce labor costs by using subcontractors to perform remaining and future UDCM work. First, the October 3, 2012 layoff letter itself expressly states that the layoff was necessary "due to the current financial state of the utility, specifically

[22] The several avenues for a union to establish that subcontracting falls within the scope of representation, as discussed herein, establish criteria describing when the benefits of bargaining outweigh the burden placed on management. These subcontracting-specific criteria stand in for the balancing test, much like topic-specific criteria we have developed for many other types of management decisions, and therefore mean that PERB and the National Labor Relations Board need not "reinvent the wheel" in each subcontracting case. (*Overnite Transportation Co.* (2000) 330 NLRB 1275, 1276, affd. in part, reversed in part mem. (3d Cir. 2000) 248 F.3d 1131(*Overnite*).)

a $10.8 million shortfall in the electric fund for the 2012/2013 fiscal year." The layoff letter then notes that while there may be a diminution in work, the remaining "substructure work for Capital Projects can be provided on an as-needed basis by qualified contractors at a lesser cost than maintaining full-time staff, especially during slow construction periods."

Doyle concluded that subcontracting UDCM work would save labor costs because, months before the layoffs, Abueg explored whether hiring private contractors would cost GWP less than continuing to pay its own employees for that work. Simmons's pre-layoff comments to UDCM employees confirm this, as he noted that the City could complete the stalled Grandview substation project "cheaper" using contract labor.

The City did not provide advance notice that it was considering subcontracting the work to save money, or any opportunity to bargain over that decision. Instead, the City hid any and all preparations or potential plans to subcontract bargaining unit work and dismissed out of hand any possibility that negotiations could ameliorate its concerns. The City did so at its own peril. As we noted in *Lucia Mar*, *supra*, PERB Decision No. 1440, in rejecting the employer's contention that it was released from the bargaining obligation based on its expectation that the union would use the process to "create alternatives to subcontracting, thereby blocking it," if negotiations "had not given the District what it believed it needed, it was still free to contract out the work at the completion" of impasse. (*Id.*, adopting proposed decision at p. 45.) "The law does not mandate success, but only requires a 'good faith' effort by the parties to reach agreement." (*Ibid*.) We cannot say here what results negotiation would have netted,

nor indeed was IBEW required to "demonstrate that it is able to solve every problem raised by the employer before it has the opportunity to negotiate," but our labor policy is founded on the determination that the chances that "a satisfactory solution could be reached . . . are good enough to warrant subjecting such issues to the process of collective negotiation." (*Id.* at pp. 43-44, quoting *Fibreboard Paper Products Corp. v. NLRB* (1964) 379 U.S. 203, 214 (*Fibreboard*).)

Even aside from our finding that labor costs played a role in the City's motivation, the City would not be excused from bargaining if it were solely motivated by its concern that UDCMs were not completing work in a timely manner. We have previously rejected the contention that subcontracting becomes a fundamental management prerogative outside the scope of negotiations merely because the employer's reasons are focused on making non-economic improvements in the services provided. (See, e.g., *Long Beach*, *supra*, PERB Decision No. 1941, p. 13; see also *Rialto*, *supra*, 155 Cal.App.4th at pp. 1307-1308 [employer required to bargain where its reasons for subcontracting included management strife, problems with delivery of services, employee lawsuits, and economic costs].) The performance of work in a timely manner, like labor costs, is an area that is particularly amenable to bilateral negotiations. (*Lucia Mar*, *supra*, PERB Decision No. 1440, adopting proposed decision at p. 43.)

Because the City failed and refused to bargain in good faith, and at times was not honest about its subcontracting plans, IBEW lost the opportunity to offer a compromise that would have allowed some or all of the UDCM employees to retain their positions. (See, e.g., *City of Sacramento*, *supra*, PERB Decision No. 2351-M, p. 22.) Thus, the City's reasons for subcontracting provide one basis for finding that the balancing test

weighs in favor finding a duty to bargain. Moreover, as discussed below, in the instant case there is also a bargaining obligation because the subcontracted duties are substantially the same as those performed by unit employees.

2. The City decided to use non-Unit 40 employees to perform substantially the same types of job duties that bargaining unit employees traditionally and historically performed

PERB has relied on federal precedent, including the United States Supreme Court's decision in *Fibreboard*, *supra*, 379 U.S. 203, to hold as follows: "[W]here the employer simply replaces its employees with those of a contractor to perform the same services under similar circumstances," then there is no need to engage in any balancing to determine whether the benefits of bargaining outweigh the costs. (*Lucia Mar*, *supra*, PERB Decision No. 1440, adopting proposed decision at p. 39.) In such cases, where an employer intends to continue performing some of the same duties as before, while using non-unit employees to perform such duties, there is no need to look at the employer's motivation for subcontracting. (*Oakland Unified School District* (2005) PERB Decision No. 1770, adopting proposed decision at pp. 37-38.)

GWP's budget deficit and the concomitant zeroing of the Capital construction fund led to at least a short-term diminution of substructure work. Nonetheless, the record is replete with evidence that, post-layoff, the City found the funds, or used another accounting mechanism, to subcontract work of the type that had previously been performed by UDCM employees, including construction involving Grandview substation, Central and Broadway, Elk Avenue, and other projects. The subcontracting and layoff were inextricably linked, as shown, for instance, when the City justified subcontracting UDCM work at Grandview substation by noting that "[d]ue to the recent

reduction in staff, GWP does not have the resources to complete this work in a timely manner."

As noted *ante*, we do not find that the City had a duty to bargain prior to reducing the amount of UDCM work it needed or wanted to perform, at least temporarily, and instead find a duty to bargain before deciding to use non-Unit 40 alternatives to perform remaining and future work. In *San Diego Adult Educators v. PERB* (1990) 223 Cal.App.3d 1124, review den. Dec. 13, 1990 (*San Diego Adult Educators*), the Court of Appeal reviewed a PERB decision (*San Diego Community College District* (1988) PERB Decision No. 662), wherein the Board determined that a community college district violated its duty to bargain by outsourcing teaching assignments for various language courses. Two groups of instructors were involved. Tenured instructors, who were paid on a monthly basis, taught so-called major language courses, including French, Spanish, and German, while non-tenured instructors, paid on an hourly basis, taught so-called minor language courses, including Farsi, Swedish, and Tagalog.

The college district decided to discontinue offering major language classes because the fees paid by students for these courses were insufficient to cover the costs of the instructors' salaries. At the time it discontinued teaching major language courses, the college district had no plans to ever resume offering these classes, nor to continue them under the control of any other entity. After members of the public pressured the college district to reinstate the major language classes, it contracted with a separate, non-profit foundation to provide the major language classes. Meanwhile, the college district continued offering minor language courses, because the fees paid by students in those subjects covered the costs of the hourly wages paid to non-tenured instructors.

The college district's decision to permanently cease offering major language courses, without any plan to make use of another source of employees to perform the work, was not bargainable. (*San Diego Adult Educators*, *supra*, 223 Cal.App.3d at p. 1134 [No need to bargain over "decision to terminate employees, based on lack of sufficient funds to support their continued employment," where there was no plan to use other employees to do the work].)

Later, however, the college district made two more decisions, each involving providing language courses under the auspices of the non-profit foundation. Specifically, the college district decided to lay off its minor language instructors and contract with the foundation to cover their courses, as well as to resume providing access to major languages, also using the foundation's employees. (*San Diego Adult Educators*, *supra*, 223 Cal.App.3d at p. 1129.)

The Court of Appeal found that the contract for minor language courses constituted unlawful subcontracting without advance notice and an opportunity to bargain, but that the college district had committed no violation when it contracted for major language courses, since this was a service the college had legitimately discontinued, before eventually changing its mind. (*San Diego Adult Educators*, *supra*, 223 Cal.App.3d at p. 1129.) The critical fact was that the college, when it discontinued the major language courses, was not even "contemplating," and had not even "commenced consideration of" any "alternative means of providing the language courses." (*Id*. at p. 1134.). Rather, at the time the college district discontinued offering major language courses, it had simply and truly decided to discontinue offering such courses on a permanent basis. (*Ibid*.) By contrast, the Court held that the same factors

required an opposite outcome regarding the college's decision to subcontract minor language courses and lay off non-tenured instructors. (*Id*. at p. 1135.) That decision was negotiable because the college intended to provide the service, meaning the layoff plan was linked to the subcontracting plan. (*Ibid*.)

Here, as in *San Diego Adult Educators, the* City's decision to layoff was clearly linked to its decision to subcontract remaining and future work, meaning it committed a clear MMBA violation by failing to provide notice and an opportunity to bargain over the decision. We reject any argument that the City decided to permanently eliminate or reduce the amount of UDCM work, as the record reflects the opposite: The City full well knew that it would be continuing to perform UDCM work even in the same fiscal year, and would be increasing that work as budget allowed thereafter, all with non-Unit 40 employees to replace the laid off UDCMs.

Our holding draws further persuasive support from federal labor law, which requires bargaining even in situations that do not involve "wholesale subcontracting" of all unit work. (*Farrell*, *supra*, 41 Cal.3d 651*,* 660-662, citing *Soule Glass and Glazing Co. v. NLRB* (1st Cir. 1981) F.2d 1055, 1088-1089, abrogated on other grounds [bargaining required where portion of the glass replacement work previously performed entirely by employees in the bargaining unit transferred out of unit] and *Office & Professional Emp. Int. U., Local 425 v. NLRB* (D.C. Cir. 1969) 419 F.2d 314, 316 [loss of an element of work and no guarantee that future work would be assigned to unit]; *O.G.S. Technologies Inc.* (2011) 356 NLRB 642, 645 [even where employer had previously subcontracted 85 percent of die-cutting work, bargaining required where employer subcontracted remaining 15 percent].) Thus, the fact that the City may have

subcontracted less than its otherwise full complement of work does not remove the subcontracting decision from the scope of representation.[23]

3. The record reveals no relevant MOU terms

Even if an employer's reasons for subcontracting are not amenable to negotiation and the subcontracted duties substantially differ from those that bargaining unit employees have traditionally or historically performed, a union can still establish a subcontracting violation if the employer unilaterally alters the terms of a written policy or agreement, or applies such policy or agreement in a new way. (*Monterey*, *supra*, PERB Decision No. 2579-M, p. 10; *Pasadena Area CCD*, *supra*, PERB Decision No. 2444, p. 12, fn. 12; *Davis*, *supra*, PERB Decision No. 2494-M, pp. 30-31.)

In the instant case, no contract was in effect while the parties were negotiating their first MOU, although the parties agreed that the terms and conditions of the previous MOU between the City and GCEA, IBEW's predecessor, would remain in effect. Neither party introduced that MOU into evidence, and thus the record does not

[23] Even if the work in question could fairly be termed "new work," which is not the case, it still would be sufficiently similar to that which the bargaining unit traditionally performed so as to require bargaining before any subcontracting decision. (See *Overnite*, *supra*, 330 NLRB 1275, 1276 [bargaining over subcontracting is not limited to situations in which it has been affirmatively shown that the employer has taken work away from current bargaining unit employees]; *Mi Pueblo Foods* (2014) 360 NLRB 1097, 1099 [same].) The principles articulated in *Overnite* and *Mi Pueblo Foods* are hardly foreign to our precedent. Indeed, we have noted that an "actual or potential" diminution of union work through subcontracting not only withdraws wages and hours associated with the contracted-out work from the unit, but also weakens the collective strength of employees in the unit, which in turn undermines their collective ability to effectively deal with the employer. (*Arcohe Union School District* (1983) PERB Decision No. 360, pp. 5-6; see also *City of Sacramento*, *supra*, PERB Decision No. 2351-M, pp. 21-22 (*Arcohe*).)

reflect whether it contained any subcontracting provisions or waived bargaining rights regarding any category of subcontracting.[24] In any event, neither party relies on MOU language.

The City does assert a waiver defense, arguing that "IBEW had no objection to the City contracting out work that was of short-term scope and duration." In support of its position, the City refers to several of IBEW's bargaining proposals, which prohibited subcontracting, except for "contracts of short-term scope and duration," as well as "contracts for expertise or proprietary equipment." Given that the parties had not reached agreement, such a proposal could not constitute a waiver. (*Regents*, *supra*, PERB Decision No. 1689-H, adopting proposed decision at pp. 49-50 [no waiver where a union's acquiescence to an employer's position occurs in the context of negotiations for total agreement and negotiations are not concluded prior to the unilateral change]; *Palo Verde Unified School District* (1983) PERB Decision No. 321, p. 14 [same].) Moreover, IBEW did not receive notice of any proposal to subcontract UDCM work, and accordingly could not have waived the right to bargain by acquiescence. (*Los Angeles Unified School District* (2017) PERB Decision No. 2518, p. 44 (*Los Angeles*) [union may only waive its right to bargain by inaction if it failed to request negotiations where it had notice of proposed change].)

Furthermore, to be effective, an alleged waiver of statutory bargaining rights must be specific, clear, and unmistakable. (*Monterey*, *supra*, PERB Decision No. 2579-M,

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[24] Even if the GCEA MOU had contained a waiver of bargaining rights, such waiver would have expired with the contract. (See *Regents of the University of California* (2004) PERB Decision No. 1689-H, adopting proposed decision at pp. 26-27 [contract-based management right ends with the expiration of the agreement] (*Regents*).)

p. 24). A similar test applies to any argument that a union has waived bargaining rights through its conduct. (See, e.g., *City of Milpitas*, *supra*, PERB Decision No. 2443-M, p. 22; *Los Angeles*, *supra*, PERB Decision No. 2518, p. 39 [waiver of bargaining rights must demonstrate "intentional relinquishment" of right to bargain]; *Regents*, *supra*, PERB Decision No. 1689-H, adopting proposed decision at p. 44 [waiver of right to bargain must be "clear and unmistakable"].) Here, although IBEW proposed to exempt projects of "short-term scope and duration" from a prohibition on subcontracting, that fact alone does not come close to establishing a waiver allowing the City to eliminate completely the UDCM classifications and use subcontractors to perform all work previously performed by the classification.[25]

Because the MMBA required the City to provide notice and an opportunity to meet and confer before contracting out substructure work previously performed by the UDCM classifications, and the IBEW did not waive its right to bargain over contracting out such work, the City violated its obligation to bargain subcontracting as required under the MMBA.[26] The subcontracting of bargaining unit work had a continuing

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[25] Moreover, even if the Union's bargaining proposal on subcontracting projects of "short-term scope and duration" could have permitted short-term subcontracting of UDCM work, and even had the parties reached agreement to put that proposal into effect prior to the City's subcontracting decision, the Union's proposal still would not apply to these facts. The Union's proposal permitted neither long-term subcontracting nor subcontracting that "results in layoff or demotion of any permanent IBEW represented employee."

[26] Although not considered by the ALJ, the City likewise violated its obligation to bargain over the effects of its decision to subcontract and transfer the UDCM's work. We have long held that the MMBA's duty to bargain extends to the implementation and effects of a decision that has a foreseeable effect on matters within the scope of representation, even where the decision itself is not negotiable. (*City of Sacramento*,

impact on terms and conditions of employment and diminished the collective strength of the employees' ability to deal effectively with the employer. (*City of Sacramento*, *supra*, PERB Decision No. 2351-M, p. 38; *Arcohe*, *supra*, PERB Decision No. 360, pp. 5-6.) This conduct was a per se violation of the City's duty to bargain in good faith.

II. Retaliation

To establish a prima facie case of retaliation, the charging party has the burden to prove, by a preponderance of the evidence, that (1) one or more employees engaged in activity protected by a labor relations statute that PERB enforces; (2) the respondent had knowledge of such protected activity; (3) the respondent took adverse action against one or more employees; and (4) the respondent took the adverse action "because of" the protected activity, which has been interpreted to mean that the protected activity was a substantial or motivating cause of the adverse action. If the charging party meets its burden to establish each of these factors, certain fact patterns nonetheless allow a respondent the opportunity to prove, by a preponderance of the evidence, that it would have taken the same action even absent protected activity.

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supra, PERB Decision No. 2351-M, p. 17; *County of Santa Clara* (2013) PERB Decision No. 2321-M, pp. 21-22; *South Bay Union School District Board of Trustees* (1982) PERB Decision No. 207a, p. 2; see also *Richmond Firefighters*, *supra*, 51 Cal.4th at p. 277.) In both contexts—a decision involving a negotiable subject or a negotiable effect of a non-negotiable decision—the employer's obligations are the same. Thus, an employer must provide timely notice and a meaningful opportunity to bargain over the reasonably foreseeable effects of its decision before implementation, just as it would be required to do with a mandatory subject of bargaining. (*City of Sacramento*, *supra*, PERB Decision No. 2351-M, p. 17; *County of Santa Clara*, *supra*, PERB Decision No. 2321-M, p. 22; *Newark Unified School District, Board of Education* (1982) PERB Decision No. 225, p. 5.)

This affirmative defense is most typically available when, even though the charging party has established that protected activity was a substantial or motivating cause of the adverse action, the evidence also reveals a non-discriminatory motivation for the same decision. In such "mixed motive" or "dual motive" cases, the question becomes whether the adverse action would not have occurred 'but for' the protected activity. (*NLRB v. Transportation Management Corporation* (1983) 462 U.S. 393, 395-402; *McPherson v. PERB* (1987) 189 Cal.App.3d 293, 304; *Martori Brothers Distributors v. Agricultural Labor Relations Bd*. (1981) 29 Cal.3d 721, 729-730; *San Diego Unified School District* (2019) PERB Decision No. 2634, pp. 12-13; *Omnitrans* (2010) PERB Decision No. 2121-M, pp. 9-10; *Los Angeles County Superior Court* (2008) PERB Decision No. 1979-C, p. 22; *Palo Verde Unified School District* (1988) PERB Decision No. 689, pp. 7-8; *Novato Unified School District* (1982) PERB Decision No. 210, pp. 5-6; *Wright Line* (1980) 251 NLRB 1083, 1086-1089.)[27]

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[27] PERB generally analyzes allegations of employer reprisal and discrimination under two lines of cases, which can be distinguished primarily by the manner in which they permit the charging party to prove nexus. (*San Diego Unified School District, supra,* PERB Decision No. 2634, p. 12, fn. 12; *Santa Clara*, *supra*, PERB Decision No. 2629-M, p. 8.) Under *Campbell Municipal Employees Assn. v. City of Campbell* (1982) 131 Cal.App.3d 416, 423-424 (*Campbell*), a charging party may establish "discrimination in its simplest form" via evidence of "employer conduct that is facially or inherently discriminatory, such that the employer's unlawful motive can be inferred without specific evidence." (*Los Angeles County Superior Court* (2018) PERB Decision No. 2566-C, p. 14.) In the absence of evidence sufficient to trigger the *Campbell* standard, we apply the *Novato* analysis of nexus factors. (*Los Angeles County Superior Court*, *supra*, at pp. 14-15.) The *Novato* factors have undoubtedly become the primary avenue for proving discrimination or retaliation allegations, and we rely on them where, as here, the employer's conduct is not inherently discriminatory and neither party argued that the adverse action was discriminatory on its face under *Campbell* and its progeny. (*County of Santa Clara*, *supra*, PERB Decision No. 2629-M, pp. 8-9.)

As the ALJ noted, in this case the first three elements of the *Novato* discrimination standard were not in serious controversy. Accordingly, the ALJ determined that IBEW demonstrated protected activity, employer knowledge, and adverse action. Neither party excepted to these findings, so they are not before us. (PERB Reg. 32300, subd. (c).)

The ALJ determined that IBEW also met its burden of showing a nexus between the employees' protected conduct and the City's decision to lay off all incumbents in the UDCM classifications, finding "there is some limited direct evidence and ample circumstantial evidence that the City was unlawfully motivated in its layoff decision." In making this determination, the ALJ properly relied upon *Cupertino Union Elementary School District* (1986) PERB Decision No. 572, p. 6, wherein PERB noted that a layoff may be unlawful as to a group of employees if the employer's layoff decision was motivated by protected activities of some group members. The ALJ then concluded, however, that the City proved its affirmative defense that it would have taken the same actions even in the absence of protected activity. The City excepts to the finding that it was at least partially motivated by unlawful animus against the employees' protected activities, while IBEW excepts to the finding that the City would have taken the same actions even absent protected activity.

Like the ALJ, we find that animus against protected activity was at least a motivating factor for the City's decision. In reaching this conclusion, we consider all of the facts recounted above, including numerous statements by managers demonstrating anti-union animus and indicating that employees should blame themselves and their

union for having caused the layoff.[28] Such statements are part of the overall context we review in assessing proof of animus. (*City of Santa Monica* (2020) PERB Decision No. 2635a-M, pp. 47-51.)

The record also persuades us that the City would have explored layoff and subcontracting decisions to save money—and likely taken some such action—even absent protected activity. The more difficult retaliation question is whether the City has met its burden of proving that it would have taken exactly the same course of action (laying off all UDCMs, without retaining any), even absent protected activity. (*San Diego Unified School District*, *supra*, PERB Decision No. 2634, p. 13 [employer's burden in mixed motive case is to establish that it would have taken the *same* actions even absent any protected activity].) For instance, the City acknowledged its continuing responsibility for vault maintenance, and considered keeping one crew to perform this work. The proposed decision did not distinguish between such different scenarios and whether the City's animus played a role in its decision among money-saving alternatives and/or its decision not to recall some UDCMs once the amount of work picked up again. These factors could in other circumstances warrant reversal, likely including a remand to the ALJ to determine the open issues. Here, however, we are cognizant that remand would lead to substantial additional delay, and the remedy for the City's unilateral changes leads to an equivalent remedy, irrespective of the extent to which the City has

[28] The evidence we consider includes Sylvers' statement that employees were at fault for joining IBEW. The ALJ credited the employees' testimony over Sylvers' general denials and Abueg's vague testimony about following up on the complaint. We find no reason to disturb that finding.

fully or partially proven an affirmative defense to the retaliation allegation.[29] On this limited basis unique to the present circumstances, we find no cause at this time to disturb the ALJ's decision to rest the remedy related to UDCM work solely on the City's failure to provide notice and an opportunity to bargain in good faith.

III. Imposition of New Terms and Conditions of Employment

On May 7, 2013, the City Council imposed terms and conditions of employment reflected in the City's March 29, 2012 proposal, which the City contends was its last offer prior to impasse. The ALJ found that even if the parties first reached impasse when the IBEW membership rejected the March 29, 2012 proposal, that impasse was broken by both parties' subsequent concessions, including the City's concessions in its June 20, 2012 proposal. Thus, the ALJ found that while the City was privileged to impose terms and conditions reflected in its June 20, 2012 offer, it was not privileged to impose the terms contained in the March 29, 2012 offer, as those terms were regressive and not reasonably comprehended within the City's final proposals. The ALJ also found that the City unilaterally imposed a no-strike clause and a bargaining waiver, thereby contravening settled precedent. (*Fresno County In-Home Supportive Services Public Authority* (2015) PERB Decision No. 2418-M, p. 37 (*Fresno*).)

The City asserts that the parties remained at impasse subsequent to the City's March 29, 2012 proposal and that the City was entitled to impose terms and

[29] As discussed above, we find that the employer had a duty to bargain over how it would staff all remaining and future UDCM work but had no duty to bargain over the decision to reduce (at least temporarily) the aggregate amount of UDCM work being performed, for budget reasons. Thus, it is apparent that even if the employer's affirmative defense leaves open that some of its decision may have been retaliatory, that would be the same portion of its decision that was bargainable.

conditions of employment consistent with that proposal. The City also argues that while it included unlawful terms in its imposition, the City did so by mistake and never enforced those terms. IBEW disagrees and further asserts that the parties did not reach a legitimate, good faith impasse on March 29, 2012 or at any point, and therefore the City was not privileged to impose any changes in terms and conditions of employment. We examine these central issues in light of applicable law.

A. The City Declared Impasse Prematurely

PERB precedent defines "impasse" as a point at which the parties' differences remain so substantial and prolonged that further meeting and conferring would be futile. (*City of San Ramon* (2018) PERB Decision No. 2571-M, p. 6 (*San Ramon*); *County of Riverside* (2014) PERB Decision No. 2360-M, p. 12 (*Riverside*).) An employer may impose new terms after impasse only if it has bargained in good faith throughout negotiations, from "inception through exhaustion of statutory or other applicable impasse resolution procedures," and its "conduct is free of unfair labor practices." (*San Ramon*, *supra*, PERB Decision No. 2751-M, p. 6; *City of San Jose* (2013) PERB Decision No. 2341-M, p. 40 (*San Jose*).)[30]

In determining the existence of impasse on a given date, PERB focuses on numerous factors, including: the number and length of negotiation sessions; the extent

[30] If an employer declares impasse without reaching a bona fide impasse after good faith negotiations, but the employer neither changes employment terms nor refuses to continue bargaining, the Board considers that evidence under the totality of conduct test. (*San Ramon*, *supra*, PERB Decision No. 2571-M, p. 7, fn. 9; *Riverside*, *supra*, PERB Decision No. 2360-M, p. 12.) In contrast, if the employer in those circumstances refuses to bargain further or proceeds to change employment terms, that constitutes further evidence of bad faith under the totality test, and it also constitutes a per se violation. (*San Ramon*, *supra*, at p. 11, fn. 9; *Riverside*, *supra*, at p. 11.)

to which the parties have exchanged information and thoroughly discussed proposals and counterproposals in good faith; and the nature of the unresolved issues and the parties' discussions of such issues to date. (*San Ramon*, *supra*, PERB Decision No. 2571-M, pp. 9-12; *Riverside*, *supra*, PERB Decision No. 2360-M, pp. 13-14 (*Riverside*).) Continued movement on minor issues will not prevent a finding of impasse if the parties remain deadlocked on one or more major issues. (*Regents of the University of California* (1985) PERB Decision No. 520-H, p. 17.) However, both parties must believe they are at the "end of their rope." (*Riverside*, *supra*, PERB Decision No. 2360-M, p. 13.)

Here, we find that the parties were not at a bona fide impasse in late March or early April of 2012, given that IBEW had indicated it still had room to move on economics, which was the main issue in the negotiations. The City was on notice of this, and therefore agreed to further meetings in order to assess any such movement. Given those facts, the City has not met its burden to show that the parties were at an impasse in late March or early April of 2012. As discussed below, the City had additional room to move as well, further showing that the City prematurely declared impasse. (*San Ramon*, *supra*, PERB Decision No. 2571-M, pp. 6 & 10 [party asserting impasse bears burden of proving it, and therefore bears risk of declaring impasse prematurely when parties were not objectively at impasse at the time].) Even assuming for the sake of argument that the parties did reach a bona fide impasse by late March or early April 2012, ample evidence supports the ALJ's finding that any such alleged impasse was broken when the parties made concessions in later negotiation sessions. An impasse "can be terminated by nearly any change in bargaining-related

circumstances" that is sufficient to suggest that "attempts to adjust differences may no longer be futile." (*PERB v. Modesto City Schools District* (1982) 136 Cal.App.3d 881, 899.) "Most obviously, an impasse will be broken when one party announces a retreat from some of its negotiating demands." (*Ibid*.)

We agree with the ALJ that in the absence of a local rule, regulation, or ordinance for dispute resolution under MMBA section 3507 and in the absence of "mutual consent" as contemplated in MMBA section 3505, the parties' post-March 29, 2012 sessions were a continuation of negotiations. (*Orange Unified School District* (2000) PERB Decision No. 1416, p. 16 [noting it was "incongruous [for employer] to admit that a major concession has been made, but continue to claim that impasse has not been broken"].) The City's denomination of its June 20, 2012 bargaining proposal as a "post impasse settlement-offer" does not remove it from bargaining. Thus, the ALJ was correct that the City's imposition of less generous terms than its June 20 offer was regressive, and those terms were not reasonably comprehended within the City's true last, best, and final offer. (*See, e.g.*, *City of Roseville* (2016) PERB Decision No. 2505-M, pp. 29-30 [where employer's last offer to union required employees to pay no more than a 4 percent annualized pension contribution, employer was not privileged, after impasse, to implement a less generous employee contribution]; *American Federation of Television and Radio Artists, AFL-CIO, Kansas City Local v. NLRB* (D.C. Cir. 1968) 395 F.2d 622, 630 [If employer imposes terms that deviate from its offer to the union, any such changes should not have "realistic significance" that "worsened the Union's

position"], cited with approval in *PERB v. Modesto City Schools District*, *supra*, 136 Cal.App.3d at p. 900.)[31]

Unlike the ALJ, however, we do not find that the City was privileged to impose the terms contemplated in its June 20, 2012 proposal. Rather, as explained immediately below, we find that the City was not privileged to do so both because of its refusal to meet after June 20, 2012 and its unremedied unilateral changes pertaining to UDCM work.

B. After June 20, 2012, the City Engaged in Bad Faith Conduct Amounting to a Refusal to Bargain

On July 11, 2012, IBEW countered the City's June 20 proposal. The July 11, 2012 bargaining session concluded with the City's negotiators stating they would take IBEW's proposal to the City Council and "get back" to the Union. The parties may have been approaching a potential good faith impasse. They might have reached such an impasse, if the City carried through with its promise to get back to IBEW, and rejected the Union's offer, and then the parties had mutually indicated they had no leeway to change their positions materially. That is not what occurred, however. Rather, as discussed further below, the City did not carry through with its promise to respond, and then utterly refused to meet, even when IBEW indicated it had still further new proposals it wished to present.

[31] The ALJ was also correct that the City exhibited subjective bad faith in its internal e-mail communications over which proposal to implement. The City chose to impose regressive terms so that bargaining unit employees would experience more financial hardship and so that the City would be in a better bargaining position during the next round of negotiations.

Doyle repeatedly put off Corona's requests to know when the City would respond to IBEW's July 2012 proposal. We have recounted the full history of this period in our factual findings. As weeks grew to months and months grew to the better part of a full year, the City's bad faith conduct became egregious, amounting to essentially an outright refusal to negotiate. In January and February 2013, still having not heard back from the City regarding its July proposal, Marrufo contacted Doyle again, but Doyle replied that the parties were at impasse and that the City was not willing to engage in any meetings that "would or could be construed as setting aside" said impasse. When Marrufo responded that IBEW's bargaining team was preparing a proposal and then in late February informed Doyle that IBEW wanted to meet with the City to present a modified proposal, Doyle reiterated that the City was not interested in holding meetings that might be viewed as setting aside the existing impasse.

On May 2, 2013, the City announced its intention to vote to impose new employment conditions at the City Council's May 7, 2013 meeting. IBEW wanted to present new proposals in a face-to-face meeting, so it could explain the proposal and its rationale. Marrufo texted Doyle, asking for a meeting. Doyle responded that he was hesitant to agree to that, because it might create an impression that the parties had reopened negotiations that may "cause delay to the implementation (which we will not do)." Doyle continued: "Unless Local 18 is open to the City's 6/20/12 impasse settlement proposal, then we are not open to a meeting."

Good faith negotiations normally require face-to-face meetings, except in rare cases where both parties prefer not to meet face-to-face. (*San Ramon*, *supra*, PERB Decision No. 2571-M, p. 9, and adopting proposed decision at pp. 37-38 & 42; *City of*

Selma (2014) PERB Decision No. 2380-M, pp. 14 & 23, and adopting proposed decision at p. 10; *Modesto City Schools* (1983) PERB Decision No. 291, p. 35.) It is beyond dispute that a bargaining party may not refuse to meet with its counterpart merely because it wishes to preserve an alleged impasse and impose new terms. (Cf. *PERB v. Modesto City Schools District*, *supra*, 136 Cal.App.3d at pp. 892-893 & 899-900 [even when parties reach impasse, duty to bargain only becomes dormant, and is revived by changed circumstances].) Nor may a party adopt a take-it-or-leave-it attitude. (*San Ramon*, *supra*, PERB Decision No. 2751-M, p. 9.) While it may often turn out that a concession offered by one party is too minor to break the logjam and bring about agreement, we do not condone a party covering its ears or refusing to meet because it is set on imposing terms unilaterally.

As noted above, in April 2013, after putting off IBEW for nine months, Doyle would describe his communications with Corona as "the series of e-mails Gus sent to me last fall about the status of negotiations, where we had to keep stalling them." While the City attempted to downplay what Doyle meant, if anything we find that "stalling" does not do justice to the City's bad faith. In reality, the City engaged in an outright refusal to bargain, so as not to risk hearing any proposal that might delay its single-minded goal of unilaterally imposing new employment terms.

Attempting to continue negotiations despite the City's negative response to any face-to-face meeting, IBEW submitted its new proposal directly to the City Council and to Doyle and Ochoa on May 6, 2013. Among other modifications, IBEW reduced its compensation demands and dropped the Union's demand for binding arbitration.

The ALJ found that the parties had reached a genuine, good faith impasse when IBEW requested further meetings in 2013 without e-mailing specific concessions sufficient to constitute changed circumstances requiring the City to schedule even a single additional bargaining session. We reverse this determination. The ALJ made this ultimate finding notwithstanding the City's refusal to meet based on its steadfast insistence that it must preserve the impasse and its right to impose, no matter what. While the ALJ is correct that a purely minor concession may not be sufficient to break an impasse if one existed already, we depart from the ALJ's analysis in these circumstances given that the City's conduct had prevented the parties from reaching a genuine, good faith impasse, and a party seeking to make a concession is normally entitled to at least one face-to-face meeting to present the concession and explain its rationale, not to mention being entitled to a response to that proposal. The record also reflects that the City gave the new proposal a perfunctory review (and did not share it with the City Council), while still declining to meet with IBEW to allow the type of give and take that is part and parcel of good faith negotiations.

Based on our independent review of the record, we find that the City's conduct prevented meaningful good faith negotiations from July 11, 2012 through its unilateral implementation 10 months later. The City insisted that negotiations were closed and adopted a take-it-or-leave-it attitude, telling IBEW that it had a choice of either accepting the City's June 20 proposal or accepting imposed terms. (*San Ramon*, *supra*, PERB Decision No. 2571-M, at pp. 9, 15.) While this conduct prevented the parties from reaching a good faith impasse, even if a good faith impasse could somehow be created by the City's refusal to get back to IBEW, the Union indicated it

wished to present further concessions and the City was not privileged to refuse to hear the new proposal. (*State of California (Department of Personnel Administration)* (2010) PERB Decision No. 2102-S, p. 6 ["A]n impasse does not terminate an employer's duty to bargain. Rather, the duty to bargain is suspended only until changed circumstances indicate that attempt to reach agreement is no longer futile."].)[32]

Significantly, it was also during this time that the City violated the MMBA by failing to provide IBEW with notice and an opportunity to meet and confer before deciding to subcontract UDCM work. The ALJ did not find that this violation impacted the City's right to impose, because the ALJ found it was not linked to the parties' MOU negotiations. We disagree, for the reasons discussed below.

C. The City's Unilateral Changes Regarding UDCM Work Constitute an Independent Basis for Finding that the City Had No Right to Impose New Employment Terms

As we determined *ante*, the City's failure to fulfill its bargaining obligation with respect to the subcontracting constituted an egregious unilateral change. An employer's unilateral change to employment terms "makes impossible the give and take that [is] the essence of labor relations." (*San Ramon*, *supra*, PERB Decision No. 2571-M, p. 12 quoting *Vernon Fire Fighters v. City of Vernon* (1980) 107 Cal.App.3d 802, 823.) Where conduct is alleged to constitute a per se violation of the duty to

[32] For all the reasons discussed above, the City was wrong to claim that the parties had been at impasse since March 2012. Even had the parties reached a legitimate, good faith impasse in March 2012, however, neither party would have been privileged to refuse to meet in the hopes of torpedoing any effort at breaking that impasse. (*San Ramon*, *supra*, PERB Decision No. 2751-M, p. 15.)

bargain, it may also indicate the absence of subjective good faith in support of a bad faith bargaining charge. (*Fresno*, *supra*, PERB Decision No. 2418-M, p. 17; *San Jose*, *supra*, PERB Decision No. 2341-M, pp. 37-39, 49-50.) Here, even aside from the other conduct set forth above, the employer's separate unfair practice contributed to the deadlock in negotiations by creating a new impediment—a significant new set of conditions over which IBEW had to bargain on a catch-up basis, after the fact, which was more than sufficient to deny the City the right to impose. (*San Ramon*, *supra*, PERB Decision No. 2571-M, pp. 6 & 15.)

The ALJ cited *Fresno* to support her conclusion that the subcontracting violation did not impact the City's right to impose. Contrary to the ALJ, we find that *Fresno* supports our conclusion. In *Fresno*, we expounded on this point:

> "A bona fide impasse exists only if the employer's conduct is free of unfair labor practices; its right to impose terms and conditions at impasse is therefore dependent on prior good faith negotiations from their inception through exhaustion of statutory or other applicable impasse resolution procedures. *(Temple City Unified School District* (1990) PERB Decision No. 841 *(Temple City).)* Thus, an employer's separate, unremedied unfair practices may interfere with the bargaining process and thereby invalidate any impasse. *(Intermountain Rural Electric Assn.* (1991) 305 NLRB 783, enforced (10th Cir. 1993) 984 F.2d 1562; *New Associates* (1992) 307 NLRB 113 l, 1135-1136, review granted and enforcement denied on other grounds (3d Cir. 1994) 35 F.3d 828.) However, an otherwise bona fide impasse in negotiations is not invalidated by an employer's separate unfair practices, if there is no evidence that the unlawful conduct contributed to the deadlock in negotiations. *(Pleasantview Nursing Home, Inc. v. NLRB* (6th Cir. 2003) 351 F.3d 747, 762.) Evidence of separate unfair practices whose occurrence was remote in time or otherwise not probative of the respondent's state of mind in negotiations is

> not relevant or appropriate for consideration. *(Pleasantview; Temple City*, *supra*, at pp. 2-4; *Gavilan Joint Community College District* (1996) PERB Decision No. 1177, pp. 5-6.)"

(*Fresno*, *supra*, PERB Decision No. 2418-M, pp. 54-55.)

Thus, in *Fresno*, the Board examined the separate unfair practice, the employer's *post-impasse* imposition of a bargaining waiver and no-strike clause. (*Id*., p. 55.) In that case, although we found that the City committed a separate unfair practice by unilaterally imposing provisions that required the union and employees to waive statutory rights and/or that implied the existence of a bilateral agreement, such post-impasse conduct could not, categorically, have contributed to the impasse in the first place. (*Ibid*.)

Unlike *Fresno*, the subcontracting violation here preceded impasse, was not remote in time, and coincided with the City's refusal to go back to the table. In fact, the City's subcontracting decision came at a critical time during negotiations for a first contract. The City, while seeking concessions in wages and benefits at the bargaining table due to budget constraints, secretly devised a unilateral means to extract still more savings from Unit 40. Because the City failed and refused to comply with its legal duty to provide notice and an opportunity to bargain, the parties lost the opportunity to discuss concessions or other proposals that may have led to viable options in lieu of at least some of the layoffs and involuntary demotions, and destroyed the good faith conditions that would be required for the parties to have any hope of bridging their other divides. (*San Mateo County Community College District* (1979) PERB Decision No. 94, p. 15 [unilateral change damages negotiating prospects because employer seeks "to negotiate from a position of advantage," forcing employees "to talk the employer back

to" the status quo. Such a "one-sided edge to the employer surely delays, and may even totally frustrate, the process of arriving at a contract."].)[33]

The parties' negotiations for an initial MOU were steered off course by the City's simultaneous and related strands of unlawful conduct: unilateral subcontracting and refusal to respond to IBEW or return to the bargaining table. Once the City announced its decision as a fait accompli, future negotiations were limited to bargaining the effects of the layoffs. The consequent diversion from negotiations was a further obstacle to the parties reaching either agreement or a legitimate, good faith impasse, and thus an independent reason why the City had no right to impose any new terms and conditions of employment. (*San Ramon*, *supra*, PERB Decision No. 2571-M, p. 7; *San Jose*, *supra*, PERB Decision No. 2341-M, p. 19.)

D. The City Imposed Terms that Could Not Have Been Lawfully Imposed Even Following a Legitimate, Bona Fide Impasse

Lastly, we affirm the ALJ's finding that the City unilaterally imposed both a no-strike clause and a bargaining waiver, both of which would have been clearly unlawful even were the rest of the imposition lawful. (*San Ramon*, *supra*, PERB Decision No. 2571-M, pp. 12-14; *Fresno*, *supra*, PERB Decision No. 2418-M, p. 40.) As in *San*

[33] The City's unilateral change—an end-run around the bargaining process—takes on particular import in the context of the negotiation of a first contract. (See, e.g., *Broadway Volkswagen* (2004) 342 NLRB 1244, 1247, enfd. sub nom. *East Bay Automotive Council v. NLRB* (9th Cir. 2007) 483 F.3d 628 ["Respondent's unilateral changes involved the important, bread-and-butter issues [...] for which employees seek and gain union representation. Such changes, particularly where the Union is bargaining for its first contract, can have a lasting effect on employees"]; *Goya Foods of Florida* (2006) 347 NLRB 1118, 1122, enfd. (11th Cir. 2008) 525 F.3d 1117; *APT Medical Transportation* (2001) 333 NLRB 760 fn. 4 ["[T]he Board should be especially sensitive to claims that bargaining for a first contract has not been in good faith."].)

Ramon, the City Council's resolution explicitly adopted the City's entire proposal dated March 29, 2012, including the no-strike and bargaining waiver language. (*San Ramon*, *supra*, PERB Decision No. 2571-M, pp. 12-14.) Although the City states that it did not intend to include that language in the City Council's imposition, it took no action to retract that language or to clarify with IBEW or bargaining unit employees that the terms were included by mistake. Our precedents treat this allegation as a per se violation for which the employer's motive or intent is irrelevant. (*San Ramon*, *supra*, PERB Decision No. 2571-M, p. 14; *Fresno*, *supra*, PERB Decision No. 2418-M, pp. 2-3, 15, 37-40.)

REMEDY

MMBA section 3509, subdivision (b), authorizes PERB to order "the appropriate remedy necessary to effectuate the purposes of this chapter." (*Omnitrans* (2010) PERB Decision No. 2143-M, p. 8.) This includes the authority to order an offending party to take affirmative actions designed to effectuate the purposes of the MMBA. (*City of Torrance* (2008) PERB Decision No. 1971-M, p. 28.) As is customary in cases where there have been unlawful unilateral changes, such as the subcontracting here, the most critical remedies needed to effectuate California's labor laws are orders requiring the City to cease and desist from its failures and refusals to bargain, and to restore the prior status quo to the extent necessary to make IBEW and employees whole for any losses, upon request by IBEW. (*City of Sacramento*, *supra*, PERB Decision No. 2351-M, p. 43, citing *County of Santa Clara*, *supra*, PERB Decision No. 2321-M, pp. 21-22; *City of Davis* (2012) PERB Decision No. 2271-M, p. 28; *Oakland Unified School District* (1983) PERB Decision No. 326, p. 45.)

Consistent with this approach, the City must cease and desist from implementing terms and conditions of employment that were implemented on May 7, 2013, and retroactively restore the status quo that existed before that date, upon request from IBEW. (*Fresno*, *supra*, PERB Decision No. 2418, pp. 56-57; *City of Davis*, *supra*, PERB Decision No. 2271-M, pp. 27-28.) Bargaining unit employees shall be made whole for any losses they may have suffered due to the City's unlawful unilateral imposition of terms and conditions of employment, along with interest at the rate of 7 percent per annum from May 7, 2013 until such time as the City restores conditions as they existed before May 7, 2013, or until the effective date of any new collective bargaining agreement between the parties, whichever is earlier. (*City of Davis*, *supra*, at p. 28.)

We will also direct the City to reinstate the eliminated UDCM classifications, retroactively fill those classifications (from the laid off UDCMs, in seniority order) with the number of UDCMs commensurate with the amount of UDCM work performed by non-Unit 40 employees at all relevant times, and to provide make-whole relief (total compensation including benefits) as part of retroactively restoring the status quo. To provide guidance to PERB's Compliance Officer in overseeing this process, we discuss below several remedy issues the City has raised and several other remedy issues that may arise.

Subsequent to the October 3, 2012 layoff letter, many UDCMs were offered demotions—some at a significantly reduced rate of pay—in lieu of layoff. Others began drawing retirement benefits, typically taking advantage of an early retirement incentive program. The City excepts to the proposed order "because it extends the

remedy and make whole order to employees who chose either to accept the retirement incentive and retired before the layoff even went into effect" or who "rejected the City's offer of alternate employment" and were laid off instead. To the extent the City raises a failure-to-mitigate defense regarding certain employees' decisions to reject a lower-paying position, in compliance proceedings OGC must apply relevant precedent, under which workers are expected to seek positions "substantially equivalent" their prior positions. (*Fresno County Office of Education* (1996) PERB Decision No. 1171, p. 2, fn. 1 & adopting proposed decision at p. 4.)

To aid in compliance, we also address an employee's decision to begin drawing retirement benefits to which the employee may be entitled. When an employer unlawfully lays off an employee, with or without an offer of demotion in lieu of layoff, each individual employee is necessarily thrust into a difficult situation to make ends meet, and may need to begin drawing early retirement benefits in order to supplement lower income earned in a new job elsewhere (this is only possible if an employee turns down any demotion offered). A decision to begin drawing retirement benefits earlier than scheduled will normally involve tradeoffs, including drawing lower total lifetime retirement benefits, and therefore an employee should not be penalized by having been forced to take that option as a consequence of the employer's unlawful conduct. On the other hand, such a decision also does not increase an employee's baseline measure of damages. Thus, for any affected employee who, through IBEW, notifies the compliance officer that he or she wishes to reverse his or her retirement and accept reinstatement as a UDCM, compliance proceedings will sometimes involve ironing out how to restore all things to their rightful places and levels without providing

either a windfall to the employee or penalizing the employee for a reasonable response to unlawful conduct. This may involve, for instance, the employer paying retroactive employer pension contributions and the employee paying, typically as a deduction from back pay amounts owed, such retirement-related monies as may be necessary to restore the status quo in an equitable manner. Any interest owed to a retirement plan must be covered by the employer, since it was the employer's conduct that caused the need for such interest payments.

Compounding these challenges, the amount of work available for UDCMs appears to have fluctuated, beginning by the final quarter of 2012 and potentially thereafter. At the time of the UDCM layoffs, GWP apparently had vault maintenance and inspection work for at least one UDCM crew, in addition to subcontracted Capital Projects that were either ongoing or in the works. However, consistent with our reasoning above, we note that there may have been at least a temporary diminution in total UDCM work performed by the City, and such diminution was not a bargainable decision. Rather, the City's violation was in using non-Unit 40 employees for remaining and future UDCM work. In our below order, we provide specific guidance to PERB's Compliance Officer regarding how to address the above factors in compliance proceedings, putting the burden on the City to prove any periods of time in which there was so little traditional UDCM work being performed that certain of the layoffs and/or failure to recall were during those times the result of a non-bargainable reduction in

work rather than a bargainable decision to use non-Unit 40 workers to perform remaining and future work.[34]

Having found a unilateral subcontracting violation, we must order the City not only to cease and desist from future subcontracting of Unit 40 work without notice and an opportunity to meet and confer, but also to rescind or modify any unilaterally adopted contracts that cover work of a type traditionally done by Unit 40 employees. (*Lucia Mar*, *supra*, PERB Decision No. 1440, adopting proposed decision at pp. 56-57; *Desert Sands Unified School District*, *supra*, PERB Decision No. 2092, pp. 30-35; see also *San Diego Adult Educators*, *supra*, 223 Cal.App.3d at p. 1137 [rescission of subcontract and reinstatement of laid off employees to future classes offered by the District].) The City may need to take affirmative steps, including rescinding or modifying contracts that cover ongoing or projected projects. While our order provides the City the option to finish any existing contracts with or without modification, any choice by the City to continue subcontracting UDCM work pursuant to existing contracts will not harm any affected employees, as the City's back pay obligation shall continue for so long as those

[34] To estimate the amount of UDCM work the City or its contractors have performed since October 2012, the compliance officer will need to examine all relevant evidence, including but not limited to subcontracting invoices and payroll records related to non-Unit 40 employees, whether employed by contractors or by the City. We note that our order is appropriate even though it necessarily will require PERB's Compliance Officer to make approximations in resolving remedy disputes. (*City of Pasadena* (2014) PERB Order No. Ad-406-M, pp. 8, 13-14 & 26-27.) Doing so is generally preferable to "permitting the employer to evade liability because of uncertainty *caused by the employer's own unlawful conduct*, and thus leaving an unfair practice unremedied. (*Id.*, p. 26, emphasis in original.)

contracts are not rescinded or modified to allow Unit 40 employees to perform UDCM work.[35]

ORDER

Upon the foregoing findings of fact, conclusions of law, and the entire record in this case, it has been found that the City of Glendale (City) violated the Meyers-Milias-Brown Act (MMBA), codified at Government Code, § 3500 et seq. The City violated MMBA sections 3503, 3505, 3506, and 3506.5, subdivisions (a), (b), and (c), and therefore committed unfair practices under MMBA section 3509, subdivision (b), and Public Employment Relations Board (PERB or Board) Regulation 32603, subdivisions (a), (b), (c), when it implemented new terms and conditions of employment effective on or about May 7, 2013, and also when it unilaterally decided to use non-Unit 40 employees to perform bargaining unit work without giving notice and opportunity to bargain to International Brotherhood of Electrical Workers, Local 18 (IBEW).

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

A. CEASE AND DESIST FROM:

1. Failing and refusing to meet and confer in good faith with IBEW over decisions to use non-Unit 40 employees to perform bargaining unit work.

2. Failing and refusing to meet and confer in good faith with IBEW by unilaterally implementing new terms and conditions of employment involving a waiver of statutory rights, or any new terms without first reaching a legitimate, good faith

[35] Notably, compliance proceedings need not involve efforts to relitigate what constitutes "UDCM work," as the parties exhaustively litigated this issue already, and the compliance officer is directed to make use of our findings on this topic, *ante*.

impasse, or any new terms that were not reasonably comprehended in the City's true last, best, and final offer prior to such a legitimate, good faith impasse.

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

1. Within 30 workdays after this decision is no longer subject to appeal, cease and desist from using non-Unit 40 employees to perform any and all types of work performed by UDCMs prior to October 2012. The City may keep in place any contract for subcontracted work already underway as of the date this decision is no longer subject to appeal, but, if the City does so, the below-described make-whole relief relating to such subcontracts shall continue accruing until the earliest of the following conditions: the subcontracts have been rescinded or modified so that all UDCM work is fully performed by Unit 40 employees; or the parties have mutually agreed to an alternative resolution.

2. Within thirty 30 workdays after this decision is no longer subject to appeal, reinstate the UDCM classifications that the City eliminated in 2012 and create enough vacant UDCM positions to perform any and all work of a type that UDCMs performed prior to October 2012.

3. Within 60 workdays after this decision is no longer subject to appeal, fill the vacant UDCM positions noted above by offering recall, in order of seniority, to the UDCMs employed as of October 2012, and, if further vacancies exist thereafter, by filling any remaining vacancies pursuant to the City's applicable hiring policies.

4. Make whole all UDCMs employed by the City as of October 2012 by paying them the full estimated value of total additional compensation and benefits

they would have earned but for their layoff or involuntary demotion, plus interest at an annual rate of seven percent per annum; provided, however, that to the extent that the City proves in compliance proceedings that since October 2012 there have been one or more timeframes in which the City has performed (through subcontracted and non-Unit 40 City workers, in aggregate) insufficient UDCM work to have warranted employing all of the laid off or demoted UDCMs, the compliance officer shall limit make-whole relief as appropriate for those UDCMs (starting with the least senior employees) who would not have enjoyed full employment as a UDCM at all times, even had the City used only Unit 40 employees to perform all UDCM work.

5. Provide IBEW with advance notice and an opportunity to meet and confer before making any decision to use non-Unit 40 employees to perform Unit 40 work.

6. Within 60 workdays after this decision is no longer subject to appeal, provide all employees who were members of the IBEW bargaining unit at any time on or after May 7, 2013 (including laid off UDCMs retroactively rehired pursuant to this order) with total compensation and benefits sufficient to make them whole for the difference between the terms that existed on May 6, 2013, and the terms and conditions implemented on May 7, 2013, plus interest at a rate of 7 percent per annum, accruing until the earliest of the following conditions: the parties have mutually agreed on a new memorandum of understanding resolving the terms in question; or the City has lawfully imposed new terms after reaching a legitimate, good faith impasse.

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

8. Within 30 workdays after this decision is no longer subject to appeal, notify the General Counsel of PERB, or his or her designee, in writing of the steps taken to comply with the terms of this Order. Continue to report in writing to the General Counsel, or his or her designee, periodically thereafter as directed. All reports regarding compliance with this Order shall be served concurrently on IBEW.

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. LA-CE-805-M, *International Brotherhood of Electrical Workers, Local 18 v. City of Glendale*, in which all parties had the right to participate, it has been found that the City of Glendale (City) violated the Meyers-Milias-Brown Act, Government Code sections 3503, 3505, 3506, and 3506.5, subdivisions (a), (b), and (c), as well as PERB Regulation 32603, subdivisions (a), (b), (c), when it implemented new terms and conditions of employment effective on or about May 7, 2013, and also when it unilaterally decided to use non-Unit 40 employees to perform Unit 40 work without giving notice and an opportunity to bargain to International Brotherhood of Electrical Workers, Local 18 (IBEW). As a result of this conduct, we have been ordered to post this Notice and we will:

A. CEASE AND DESIST FROM:

1. Failing and refusing to meet and confer in good faith with IBEW over decisions to use non-Unit 40 employees to perform bargaining unit work.

2. Failing and refusing to meet and confer in good faith with IBEW by unilaterally implementing new terms and conditions of employment involving a waiver of statutory rights, or any new terms without first reaching a legitimate, good faith impasse, or any new terms that were not reasonably comprehended in our true last, best, and final offer prior to such a legitimate, good faith impasse.

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

1. Within 30 workdays, cease and desist from using non-Unit 40 employees to perform any and all types of work performed by Underground Distribution Construction Mechanics (UDCM) prior to October 2012. We may keep in place any contract for subcontracted work already underway as of the date this decision is no longer subject to appeal, but, if we do so, the below-described make-whole relief relating to such subcontracts shall continue accruing until the earliest of the following conditions: the subcontracts have been rescinded or modified so that all UDCM work is fully performed by Unit 40 employees; or we have mutually agreed to an alternative resolution with IBEW.

2. Within 30 workdays, reinstate the UDCM classifications that we eliminated in 2012 and create enough vacant UDCM positions to perform any and all work of a type that UDCMs performed prior to October 2012.

3. Within 60 workdays, fill the vacant UDCM positions noted above by offering recall, in order of seniority, to the UDCMs employed as of October 2012, and, if further vacancies exist thereafter, by filling any remaining vacancies pursuant to our applicable hiring policies.

4. Make whole all UDCMs we employed as of October 2012, by paying them the full estimated value of total additional compensation and benefits they would have earned but for their layoff or involuntary demotion, plus interest at an annual rate of seven percent per annum; provided, however, that to the extent that we prove in compliance proceedings that since October 2012 there have been one or more timeframes in which we have performed (through subcontracted and non-Unit 40 City workers, in aggregate) insufficient UDCM work to have warranted employing all of the laid off or demoted UDCMs, the compliance officer shall limit make-whole relief as appropriate for those UDCMs (starting with the least senior employees) who would not have enjoyed full employment as a UDCM at all times, even had we used only Unit 40 employees to perform all UDCM work.

5. Provide IBEW with advance notice and an opportunity to meet and confer before making any decision to use non-Unit 40 employees to perform Unit 40 work.

6. Within 60 workdays, provide all employees who were Unit 40 members on or after May 7, 2013 (including laid off UDCMs retroactively rehired pursuant to this order) with total compensation and benefits sufficient to make them whole for the difference between the terms that existed on May 6, 2013, and the terms and conditions implemented on May 7, 2013, plus interest at a rate of 7 percent per annum, accruing until the earliest of the following conditions: we have mutually agreed with IBEW on a new MOU resolving the terms in question; or we lawfully imposed new terms after reaching a legitimate, good faith impasse.

Dated: _____ CITY OF GLENDALE

By:_____

Authorized Agent

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