STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD

CITY & COUNTY OF SAN FRANCISCO and OFFICE OF COMMUNITY INVESTMENT & INFRASTRUCTURE, Respondents, and SERVICE EMPLOYEES INTERNATIONAL UNION, LOCAL 1021, Exclusive Representative.	Case No. SF-IM-140-M Administrative Appeal PERB Order No. Ad-415-M August 19, 2014
CITY & COUNTY OF SAN FRANCISCO and OFFICE OF COMMUNITY INVESTMENT & INFRASTRUCTURE, Respondents, and INTERNATIONAL FEDERATION OF PROFESSIONAL & TECHNICAL EMPLOYEES, LOCAL 21, Exclusive Representative.	Case No. SF-IM-141-M

Appearances: Terence J. Howzell, Attorney, for City & County of San Francisco; Renne, Sloan, Holtzman & Sakai by Jeffrey Sloan, Attorney, for Office of Community Investment & Infrastructure; Weinberg, Roger & Rosenfeld by Robert E. Szykowny, Attorney, for Service Employees International Union, Local 1021; Leonard Carder by Peter W. Saltzman, Attorney, for International Federation of Professional & Technical Employees, Local 21.

Before Huguenin, Winslow and Banks, Members.

DECISION

BANKS, Member: These cases, which were consolidated to address common issues,[1] are before the Public Employment Relations Board (PERB or Board) on appeal from

[1] The Board may sever, consolidate or otherwise alter the timelines or sequence in which it investigates allegations before it to achieve administrative efficiency. (*Trustees of the California State University* (2014) PERB Decision No. 2384-H, pp. 3-4.)

administrative determinations (attached) by the Office of the General Counsel. The administrative determinations partially granted and partially denied requests by Service Employees International Union, Local 1021 (SEIU) and International Federation of Professional and Technical Employees, Local 21 (IFPTE) (collectively, Unions) for advisory factfinding, pursuant to Meyers-Milias-Brown Act (MMBA) section 3505.4, subd. (a).[2] The administrative determinations approved the Unions' requests for factfinding as to their negotiations with the Office of Community Investments and Infrastructure (OCII), which is the statutorily-designated "successor agency" to the San Francisco Redevelopment Agency (SFRA) whose former employees are represented by the Unions. However, the administrative determinations denied the Unions' requests for factfinding with the City & County of San Francisco (CCSF), which the Unions claim is, "at the very least, a joint employer" of the former SFRA employees. The Unions currently have an unfair practice charge, PERB Case No. SF-CE-1109-M, pending in the Office of the General Counsel that alleges CCSF, as a joint employer of former SFRA employees, has failed and refused to meet and confer with the Unions regarding the wages, hours and other terms and conditions of employment of the former SFRA employees, in violation of MMBA section 3505 and PERB Regulations.[3] The Unions appeal from that portion of the administrative determinations denying their requests to include CCSF in the factfinding.

For the reasons discussed below, we affirm the Office of the General Counsel's administrative determinations ordering factfinding for the disputes between the Unions and

[2] The MMBA is codified at Government Code section 3500 et seq. All further statutory references are to the Government Code unless otherwise noted.

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

OCII. We also affirm the Office of the General Counsel's decision not to order factfinding for the disputes between the Unions and CCSF but for different reasons than those stated in the administrative determination. Instead of deciding whether CCSF's charter applies to the Unions' disputes with CCSF, we believe that the central issue in theses appeals—whether CCSF is a joint employer with OCII of the former SFRA employees—is best determined through unfair practice proceedings. If it is ultimately determined that CCSF has an obligation to bargain with the Unions regarding SFRA employees' terms and conditions of employment, and if a bargaining order results, and if the parties to those negotiations thereafter reach bona fide impasse, the issue of charter coverage may be addressed at that time. However, it is premature to make such a determination at this stage of the proceedings.

PROCEDURAL HISTORY

On January 14, 2014, OCII's lead negotiator Jeffrey Sloan (Sloan) provided the Unions with written confirmation of OCII's declaration of impasse.

On February 12, 2014, the Unions filed separate, but otherwise identical, requests for factfinding for negotiations with *both* OCII and CCSF.

On February 18, 2014, OCII and CCSF submitted position statements in response to the Unions' factfinding requests. OCII stated its readiness to participate in factfinding with the Unions, provided CCSF was not included in the factfinding. CCSF's position statement argued that, by operation of law, it was not the employer (joint or otherwise) of the former SFRA employees, and that, insofar as the Union's factfinding requests were directed at CCSF, they were defective. Both OCII and CCSF also argued that, as a charter city and county, CCSF

is not subject to factfinding under MMBA section 3505.4, because section A8.409-4 of CCSF's charter provides for binding arbitration for resolving impasse disputes.[4]

On February 13, 2014, SEIU requested that the Board agent take official notice of the unfair practice charge in Case No. SF-CE-1109-M and on February 15 and 19, 2014, SEIU submitted position statements in support of the Unions' factfinding requests.

On February 25, 2014, the Board agent issued her administrative determinations, which approved factfinding for the Unions' dispute with OCII, but determined that factfinding was not appropriate for the Unions' disputes with CCSF.

On March 10, 2014, the Unions filed their appeals.

On March 24, 2014, CCSF filed its response to the Unions' appeals.

On March 25, 2014, OCII filed its response to the Unions' appeals.

FACTUAL BACKGROUND[5]

The Unions are the exclusive representatives of former employees of SFRA which, until 2011, was an agency of CCSF. In separate unfair practice proceedings, they allege that,

[4] MMBA section 3505.5, subdivision (e), reads as follows:

> A charter city, charter county, or charter city and county with a charter that has a procedure that applies if an impasse has been reached between the public agency and a bargaining unit, and the procedure includes, at a minimum, a process for binding arbitration, is exempt from the requirements of this section and Section 3505.4 with regard to its negotiations with a bargaining unit to which the impasse procedure applies.

[5] The following summary is comprised of facts set forth in the administrative determinations, which all parties have adopted in their respective position statements and/or appeals or responses to appeals. Those facts are further supplemented by information from various parties' requests for official notice.

before the dissolution of SFRA, they had memorandum of understandings (MOUs) with CCSF, which were set to expire on January 31, 2014.[6]

In 2011, the Legislature enacted Assembly Bill (AB) Nos. 26 and 27 to stabilize school funding by reducing or eliminating the ability of community redevelopment agencies to divert property tax revenues from school districts. AB 26, the Community Redevelopment Law, dissolved local redevelopment agencies and transferred their assets and obligations to designated "successor agencies," effective October 1, 2011. AB 26 defined the "successor agency" as "the county, city, or city and county that authorized the creation of each redevelopment agency or another entity as provided in [Health and Safety Code] Section 34173."[7]

In June 2012, the Legislature passed additional legislation, referred to as AB 1484, which attempted to clarify the definition of "successor agency." Following passage of AB 1484, Health and Safety Code, section 34173, subdivision (g), states that a "successor agency" to a former local redevelopment agency is a separate public entity from the public agency that provides for its governance, that the two entities shall not merge, and that the assets and liabilities of the former redevelopment agency shall not merge with those of the "successor organization." After enactment of AB 1484, a successor agency "has its own name, can be sued, and can sue," and "[a]ll litigation involving a redevelopment agency shall automatically be transferred to the successor agency." However, the "separate former redevelopment agency

[6] Although we decline to resolve the issues raised by the Unions' unfair practice charge in the present administrative appeal as requested by SEIU Local 1021, we take official notice of the contents of PERB's own case file in IFPTE AFL-CIO, Local 21 & SEIU Local 1021 v. City & County of San Francisco (Unfair Practice Case No. SF-CE-1109-M).

[7] AB 27, which would have permitted redevelopment agencies to continue operating if the cities and counties that created them agreed to make alternative payments into funds benefiting the state's schools and special districts, was struck down as unconstitutional, though the Supreme Court has upheld the constitutionality of AB 26's provisions for the dissolution of local redevelopment agencies and the transfer of their assets and liabilities to "successor agencies." (*California Redevelopment Assn. v. Matosantos* (2011) 53 Cal.4th 231, 241.)

employees shall not automatically become sponsoring entity employees of the sponsoring entity and the successor agency shall retain its own collective bargaining status." (Health & Saf. Code, § 34173, emphasis added.)

All parties agree that OCII is the "successor agency" to SFRA, as defined by the statute. On an unspecified date, the Unions began joint bargaining with OCII for memoranda of understanding (MOUs) covering the former SFRA employees.

The Unions allege that, on or about July 25, 2012, the Unions and CCSF also agreed to a set of ground rules for negotiations concerning successor MOUs covering the former SFRA employees. In response to the Unions' unfair practice charge, Carol Isen, an employee relations representative of CCSF, asserts that she was acting as a labor relations representative of the successor agency to SFRA at the time she signed the ground rules.

Following passage of AB 1484, CCSF took the position that it is no longer the employer of the former SFRA employees and it has since refused to meet with the Unions.

On or about August 6, 2013, the Unions filed their unfair practice charge, captioned IFPTE AFL-CIO, Local 21 & SEIU Local 1021 v. City & County of San Francisco (PERB Case No. SF-CE-1109-M). On or about November 21, 2013, the Unions filed a first amended unfair practice charge, in which they allege, among other things, that CCSF retains sufficient control over OCII and the former SFRA employees' terms and conditions of employment, that it is, at minimum, a "joint employer" of those employees, and that its refusal to meet and confer with the Unions constitutes a failure and refusal to bargain, in violation of MMBA section 3505 and PERB Regulations. Investigation of that charge is pending before PERB's Office of the General Counsel.

Without prejudice to their position in the unfair practice charge, during negotiations with OCII, the Unions have proposed to recognize CCSF as an employer or joint employer of

the former SFRA employees. The Unions argue that, while the statute says "former redevelopment agency employees shall not *automatically* become sponsoring entity employees of the sponsoring entity," neither does it categorically preclude that result, if the sponsoring entity agrees to be recognized as the employer. OCII has consistently rejected these proposals and CCSF argues that the intent of the 2011-2012 legislation was to establish a complete legal separation between the sponsoring entities and the successor agencies, and that CCSF's withdrawal from negotiations was an effort to comply with the newly-enacted legislation.

CCSF argues that, as of the date SFRA was dissolved, SFRA employees became employees of the "successor agency," which, *at that time*, i.e., before the 2012 clarification of the law brought about by AB 1484, meant "the county, city or city and county that authorized the creation of each redevelopment agency or another entity as provided in [Health and Safety Code] Section 34173." However, CCSF contends, after the passage of AB 1484 in June 2012, the new definition of "successor agency" contained in Health and Safety Code section 34190, subd. (e) states the opposite, i.e., that "a successor agency is a *separate* public entity from the public agency that provides for its governance *and the two entities shall not merge.*" (Emphasis added.)

The last meeting between the Unions and OCII occurred on January 9, 2014. On February 9, 2014, Sloan informed the Unions that OCII considered negotiations to be at impasse. On January 14, 2014, Sloan provided the Unions with written confirmation of OCII's declaration of impasse. The parties continued to exchange communications and discuss the possibility of further negotiations. However, on January 23, 2014, Sloan again provided written confirmation of OCII's declaration of impasse. At that time, OCII and the Unions severed their previously joint negotiations, pursuant to their ground rules.

THE ADMINISTRATIVE DETERMINATION

The status of OCII as "the" employer or "an" employer was not in dispute. Nor was there any dispute that negotiations between the Unions and OCII had reached impasse on or about February, which was confirmed in writing by OCII's bargaining representative on February 14, 2011. The administrative determinations concluded that the Unions' requests for factfinding as to their dispute with OCII satisfied the statutory criteria and PERB Regulation 32802. The Unions do not appeal this part of the administrative determinations.

In considering the Unions' requests for factfinding with CCSF, the Board agent identified two issues: (1) whether CCSF is a joint employer of the former SFRA employees (joint employer issue); and (2) whether the dispute between the Unions and CCSF is subject to the binding interest arbitration provisions in the CCSF charter (the charter coverage issue). As requested by the Unions, the administrative determinations took official notice of the Unions' unfair practice charge and recited various factual allegations included therein purporting to document the nature and extent of CCSF's involvement in negotiations and CCSF's alleged control over the former SFRA employees' terms and conditions of employment. However, the administrative determinations declined to reach the "joint employer" issue urged by the Unions.

Instead, the Board agent considered the "Charter coverage issue" and concluded that because the Unions' disputes with CCSF would not be subject to MMBA factfinding, *even assuming CCSF's joint employer status* as alleged by the Unions, it was unnecessary to decide whether CCSF is a "joint employer" or otherwise an appropriate party to the Unions' dispute with OCII. As noted above, MMBA section 3505, subdivision (e) exempts charter entities from the MMBA factfinding provisions if the bargaining dispute is subject to a process for binding arbitration under the charter entity's charter. The administrative determinations

reasoned that, because here, CCSF's charter provides for a three-member arbitration panel to resolve bargaining disputes, under MMBA section 3505, subdivision (e), the Unions' dispute with CCSF is not subject to the factfinding provisions of the MMBA, regardless of CCSF's relationship to OCII and the former SFRA employees.

THE ISSUES ON APPEAL

The Unions argue, among other things, that as a result of the denial of their factfinding request, the former SFRA employees are left in a legal limbo. They argue that because CCSF does not regard itself as a party to negotiations or a proper party to any factfinding concerning this dispute, CCSF will not utilize the binding arbitration provisions included in the CCSF charter *or* engage in MMBA factfinding, thereby "leaving [the former SFRA employees] unable to pursue either MMBA fact-finding or Charter impasse procedures." According to the Unions, such a result is repugnant to fundamental fairness and contrary to the intent of the Legislature when it enacted the MMBA factfinding provisions.

The Unions also challenge the conclusion that their dispute with CCSF would not be subject to MMBA factfinding, even assuming CCSF were deemed a proper party to such factfinding, because the dispute would instead be subject to binding interest arbitration under the CCSF charter. The Unions note that the charter does not cover all disputes with all bargaining units. Rather, it only applies "with regard to ... negotiations with a bargaining unit to which [the charter entity's] impasse procedures [apply]." Further, by its own terms, A8.409 categorically exempts some employee classifications, such as police officers, firefighters, and unrepresented employees, from its binding arbitration provisions. Other employee classifications, such as registered nurses, platform employees, and coach and bus operators, are also exempted, but may opt into the binding arbitration provisions. They argue that whether a

bargaining unit of former SFRA employees is subject to the impasse resolution procedures of A8.409 "remains an open question."

The Unions contend that CCSF cannot be permitted to "speak out of both sides of its mouth" by both pointing to the CCSF charter's binding arbitration provisions as exempting it from MMBA factfinding and, at the same time, asserting that CCSF is not subject to the binding arbitration provisions of its charter as to the present dispute, because it is not the employer of the former SFRA employees. According to the Unions, if CCSF contends that disputes over negotiations for the former SFRA employees are ineligible for interest arbitration under A8.409-4, then CCSF must be subject to factfinding under the language of MMBA section 3505.4.

CCSF contends that the only proper parties to MMBA factfinding proceedings are the parties who have reached impasse in their negotiations. According to CCSF, it is not the employer of the former SFRA employees or a party to negotiations concerning their terms and conditions of employment, and because there were no negotiations between CCSF and the Unions, there has been no impasse and no written notice declaring impasse as to negotiations between the Unions and CCSF. Consequently, the statutory requirements for PERB to approve MMBA factfinding have not been satisfied as to any dispute between the Unions and CCSF.

Additionally, CCSF argues that pursuant to MMBA section 3505.5, subdivision (e), it is exempt from factfindng, regardless of its relationship to OCII or former SFRA employees, because CCSF's charter provides for binding interest arbitration to resolve bargaining disputes that have reached impasse. It rejects the Unions' contention that former SFRA employees are not covered by the Charter's interest arbitration provisions, by noting that section A8.409-1 applies to "all miscellaneous employees," which is defined elsewhere in the charter to include all non-safety employees. It contends that only registered nurses and unrepresented employees

are exempt, because they are specifically exempted. CCSF also questions PERB's jurisdiction to determine administratively the central issue the Unions have asked PERB to decide in the separate unfair practice charge pending before PERB, i.e., whether CCSF is a joint employer of the OCII employees.

DISCUSSION

We begin by addressing CCSF's concern that PERB lacks jurisdiction to resolve in administrative proceedings, such as factfinding requests, matters common to both the factfinding request and an unfair practice case.

MMBA section 3505.4 establishes a factfinding procedure for resolving post-impasse bargaining disputes. The procedure may be invoked only by the representative employee organization after mediation efforts, if available, have failed to produce a settlement and its timeline to request factfinding is triggered by either party's written declaration of impasse. (*City of Redondo Beach* (2014) PERB Order No. Ad-409-M (*City of Redondo Beach*).) The factfinding procedure is advisory only and is not available if the dispute is subject to binding interest arbitration, as provided for by the charter of a charter city, charter county, or charter city and county.

In *City of Redondo Beach*, the Board explained that PERB's authority to order factfinding derives from MMBA section 3505.4 and not necessarily from section 3509, which establishes PERB's jurisdiction to decide unfair practice issues under the MMBA. However, *City of Redondo Beach* did not consider whether section 3505.4 is the sole source of PERB's authority to act in the context of a factfinding request, or whether it may also rely on its unfair practice jurisdiction under section 3509 to resolve overlapping unfair practice issues in the context of a factfinding request and/or an administrative appeal arising therefrom.

In *County of Contra Costa* (2014) PERB Order No. Ad-410-M (*Contra Costa*) and in *County of Fresno* (2014) PERB Order No. Ad-414 (*County of Fresno*), we held that PERB has authority under MMBA section 3505.4 to determine whether factfinding applies to the particular dispute in which the request for factfinding arises. This authority includes not only determining whether a union's request for factfinding was timely (as was the issue in *City of Redondo Beach*), but also whether any other statutory exceptions to MMBA factfinding apply, such as the one set forth in MMBA section 3505.5. As stated in *Contra Costa*, "Implicitly contained within the authority to determine whether [a factfinding] request is sufficient is the jurisdiction to assess whether the request is properly before the Board, i.e., whether the conditions precedent to a valid request for factfinding exist." (*Id.* at p. 11.)

County of Fresno, *supra*, PERB Order No. Ad-414-M involved potentially overlapping issues in a factfinding request (whether factfinding applied to the bargaining dispute) and in an unfair practice case (whether the employer unilaterally imposed terms and conditions of employment before exhausting impasse resolution procedures). We explained that, although the issues in the factfinding request conceivably overlaps with an issue in the unfair practice case, their resolution does not prejudice or determine the ultimate outcome in the unfair practice case, because unfair practice proceedings and potential orders following a determination of liability are distinct from administrative determinations on whether the prerequisites for factfinding exist.

Under PERB's "broad" remedial powers "to take action and make determinations that are necessary to effectuate the policies of" the statutes it administers (*Mt. San Antonio Community College Dist. v. Public Employment Relations Bd.* (1989) 210 Cal.App.3d 178, 189-190), we conclude that, in the course of responding to a factfinding request, the Board has jurisdiction to decide all relevant and necessary factual and legal issues pertinent to that request, even if those

issues are also raised in a pending unfair practice case. Although PERB has thus far exercised its jurisdiction to decide "joint employer," "single employer," "alter ego" or other jurisdictional issues within the context of unfair practice cases (*County of Ventura* (2012) PERB Decision No. 2272-M; *El Camino Hospital District* (2009) PERB Decision No. 2033-M; *United Public Employees v. Public Employment Relations Bd.* (1989) 213 Cal.App.3d 1119; *Hornet Foundation, Inc.* (1985) PERB Decision No. 521-H), the Board may exercise that same authority to resolve factual and legal issues in a factfinding request, even if they overlap with issues in a pending unfair practice case. (*Contra Costa, supra*, PERB Order No. Ad-410-M, p. 11; *County of Fresno, supra*, PERB Order No. Ad-414-M, pp. 5-8; *City of Redondo Beach, supra*, PERB Order No. Ad-409-M, pp. 4-5.)

Although we conclude that the Board has jurisdiction to resolve the "joint employer" issue raised by the Unions, we are not persuaded by their argument that we *must* exercise that power in this instance to resolve unfair practice issues in the context of an administrative appeal.

We do not adopt the Office of the General Counsel's determination that the CCSF charter precludes factfinding between the Unions and CCSF. We consider it unnecessary to determine the complex factual and legal issues regarding the meaning of the CCSF charter at this stage of the proceedings. If it is determined CCSF is a joint employer and if it is ordered to bargain and if it then reaches impasse, and then raises as a defense that the charter provisions apply instead of MMBA factfinding, and if the Unions dispute that contention, we can decide it then.

In so ruling, we do not announce a general rule under which factfinding requests must await the outcome of a separate unfair practice case simply because they involve potentially common factual or legal issues. Because of the generally time-sensitive nature of factfinding requests, in instances where it is necessary to resolve a factual dispute, we may exercise our

jurisdiction by remanding the request for an investigation or hearing, as appropriate. (MMBA, § 3509; EERA,[8] § 3541.3, subd. (h).) We simply hold that in the circumstances of the present administrative appeals and the separate unfair practice case, it is unnecessary for the Board to attempt to resolve complex legal and factual issues that are better suited to the unfair practice proceedings, with no resulting prejudice to the parties.

SEIU has also requested oral argument. Although PERB's Regulations generally contemplate oral argument before the Board only in unfair practice cases, representation matters, or other proceedings involving a formal hearing (*compare* PERB Reg. 32190, subd. (d); 32315 *with* 32350; 32360), the Board's general powers "[t]o take any other action as the board deems necessary to discharge its powers and duties and otherwise to effectuate the purposes of [the MMBA]" undoubtedly extend to hearing oral argument, where necessary to decide an administrative appeal. (MMBA, § 3509; EERA, § 3541.3, subd. (n).) However, to the extent the Unions have raised issues that the Board must decide in the current procedural posture of these administrative appeals, those issues are sufficiently clear to make oral argument unnecessary. (*City of San Diego (Office of the City Attorney)* (2010) PERB Decision No. 2103-M, p. 2, fn. 4.)

ORDER

The Service Employees International Union, Local 1021's appeal of the administrative determination in Case No. SF-IM-140-M, and the International Federation of Professional & Technical Employees, Local 21's appeal of the administrative determination in Case No. SF-IM-141-M are hereby DISMISSED.

Members Huguenin and Winslow joined in this Decision.

[8] The Educational Employment Relations Act (EERA) is codified at section 3540 et seq.

PUBLIC EMPLOYMENT RELATIONS BOARD

San Francisco Regional Office
1330 Broadway, Suite 1532
Oakland, CA 94612-2514
Telephone: (510) 622-1021
Fax: (510) 622-1027

February 25, 2014

Kerianne R. Steele, Attorney
Weinberg, Roger & Rosenfeld
1001 Marina Village Parkway, Suite 200
Alameda, CA 94501

Rafal Ofierski, Deputy City Attorney
City & County of San Francisco
1390 Market Street, 5th Floor
San Francisco, CA 94102

Jeffrey Sloan, Attorney
Renne, Sloan, Holtzman & Sakai
350 Sansome Street, Suite 300
San Francisco, CA 94104-1304

Re: *City & County of San Francisco and Office of Community Investments & Infrastructure and Service Employees International Union Local 1021*
Case No. SF-IM-140-M
Administrative Determination

Dear Interested Parties:

On February 12, 2014, Service Employees International Union, Local 1021 (SEIU) filed a request for factfinding with the Public Employment Relations Board (PERB or Board) pursuant to section 3505.4 of the Meyers-Milias-Brown Act (MMBA) and PERB Regulation 32802.[1] SEIU asserts that it and joint employers Office of Community Investments and Infrastructure (OCII) and the City and County of San Francisco (CCSF) have been unable to effect a settlement in their current negotiations for a successor agreement. The OCII gave written notice of declaration of impasse by letter dated January 14, 2014.

On February 18, 2014, the OCII, through its attorney, Jeffrey Sloan, provided a position statement. On February 18, 2014, the CCSF, through its attorney Rafal Ofierski, also provided a position statement. SEIU, through its attorney, Kerianne Steele, provided a request for official notice on February 13, 2014, and position statements on February 15 and February 19, 2014.

[1] The MMBA is codified at Government Code section 3500 et seq. PERB Regulations are codified at California Code of Regulations, title 8, section 31001 et seq. The text of the MMBA and PERB Regulations may be found at www.perb.ca.gov.

A separate factfinding request has been filed by the International Federation of Professional and Technical Engineers, Local 21 (IFPTE Local 21) against both the OCII and the CCSF. This factfinding request, case number SF-IM-141-M, will be addressed by a separate document. Official notice is taken of the documents filed in case number SF-IM-141-M, particularly the reply position statement filed by IFPTE Local 21 on February 19, 2014.

Factual Background

The OCII is a successor agency to the former San Francisco Redevelopment Agency. Due to this transformation, as well as recent statutory changes, the correct identity of the "employer," and/or the existence of a "joint employer" is currently in dispute between the parties. Specifically, the issue is whether the bargaining unit members (of both IFPTE Local 21 and SEIU) should be considered employees of the CCSF, the OCII, or both. This dispute over employer identity is a central issue in pending unfair practice charge *IFPTE Local 21 and SEIU Local 1021 v. City and County of San Francisco*, PERB UPC Case Number SF-CE-1109-M.[2]

In 2011, the California Legislature enacted Assembly Bills Nos. 26 and 27 (2011-2012 1st Ex. Sess.), which dissolved existing redevelopment agencies and transferred their assets and obligations to "successor agencies." This enactment was upheld, in relevant part, in *California Redevelopment Assn. v. Motosantos* (2011) 53 Cal.4th 231. In June 2012, the Legislature enacted Assembly Bill 1484 (2011-2012 Regular Sess.) which, among other things, clarified the definition of "successor agency." (See, e.g., Health & Saf. Code, § 34173.) In approximately September 2012, the CCSF Board of Supervisors then passed City Ordinance number 215-12 concerning the status of the successor agency, later known as the OCII. This resulted in a dispute among the parties as to the correct identity of the employer of the employees in the SEIU and IFPTE Local 21 bargaining units

On an unspecified date, representatives of OCII and/or CCSF began meeting and negotiating with SEIU and IFPTE Local 21 over a successor Memorandum of Understanding (MOU). While SEIU and IFPTE Local 21 represent separate bargaining units, joint bargaining sessions have been conducted with the two unions together.

Ground rules for the joint negotiations were prepared on CCSF Department of Human Resources letterhead, and signed on July 24, 2012, by Carol Isen[3] on behalf of the CCSF. These ground rules were also signed, on the same day, by Alex Tonisson for IFPTE Local 21 and by Leah Berlanga for SEIU. Ms. Isen later submitted a verification dated September 27, 2013, in connection with UPC Case No. SF-CE-1109-M, stating that she had been serving as the labor relations representative for the successor agency to the San Francisco Redevelopment

[2] This charge is presently under investigation by the Office of the General Counsel. PERB takes official notice of the case file in this action.

[3] Ms. Isen's title is not specified.

Agency. Ms. Isen submitted a second verification dated January 10, 2014, stating that she was an employee relations representative with the City and County of San Francisco. Accordingly, it is unknown whether she was agreeing to the ground rules on behalf of the CCSF or on behalf of the OCII.

According to IFPTE Local 21 and SEIU, the CCSF Department of Human Resources served as the labor relations representative for the Redevelopment Agency until late 2013. Further, SEIU and IFPTE Local 21 assert that the CCSF has exercised significant control over the negotiations. It appears that SEIU and IFPTE Local 21 engaged in bargaining with the OCII, but expressly reserved their rights as to their argument that the CCSF should also be a participant. Mr. Sloan indicates that he served as chief negotiator for the OCII.

The parties' last meeting was on January 9, 2014. No agreement was reached at this meeting, and the OCII verbally declared that it believed the parties were at impasse. According to the OCII, the parties also severed, pursuant to the ground rules, what had previously been joint negotiations with both unions.

On January 14, 2014, the OCII, through its attorney and chief negotiator Mr. Sloan, sent SEIU representative Ms. Berlanga a written notice of declaration of impasse. The parties did not agree to mediate the dispute. On January 23, 2014, Mr. Sloan sent a second letter confirming the previous declaration of impasse.

Discussion

MMBA section 3505.4, subdivision (a),[4] provides as follows:

> The employee organization may request that the parties' differences be submitted to a factfinding panel . . . If the dispute was not submitted to mediation, an employee organization may request that the parties' differences be submitted to a factfinding panel not later than 30 days following the date that either party provided the other with a written notice of a declaration of impasse. . . .

PERB Regulation 32802 provides as follows:

> (a) An exclusive representative may request that the parties' differences be submitted to a factfinding panel. The request shall

[4] The factfinding provisions were added to the MMBA by Assembly Bill 646 (Stats. 2011, Ch. 680, § 2) and amended by Assembly Bill 1606 (Stats. 2012, Ch. 314, § 1.) The amendment, which added the language about either party providing written notice of declaration of impasse, was intended to be technical and clarifying of existing law. (Stats. 2012, Ch. 314, § 2.)

> be accompanied by a statement that the parties have been unable to effect a settlement. Such a request may be filed:
>
> (1) Not sooner than 30 days, but not more than 45 days, following the appointment or selection of a mediator pursuant either to the parties' agreement to mediate or a mediation process required by a public agency's local rules; or
>
> (2) If the dispute was not submitted to mediation, not later than 30 days following the date that either party provided the other with written notice of a declaration of impasse.

The parties did not submit the bargaining dispute to mediation or select a mediator. Therefore, SEIU's factfinding request is based upon the written notice of a declaration of impasse by OCII.[5] It appears that there has been no written notice of declaration of impasse with respect to bargaining with the CCSF. The OCII's letter dated January 14, 2014, constitutes a written notice of declaration of impasse, with respect to the OCII, within the meaning of section 3505.4. The instant factfinding request was timely filed within thirty days, on February 12, 2014.

2. Charter Arbitration Exception to MMBA Factfinding

MMBA section 3505.5, subdivision (e), provides as follows:

> A charter city, charter county, or charter city and county with a charter that has a procedure that applies if an impasse has been reached between the public agency and a bargaining unit, and the procedure includes, at a minimum, a process for binding arbitration, is exempt from the requirements of this section and Section 3505.4 with regard to its negotiations with a bargaining unit to which the impasse procedure applies.

The CCSF provides a copy of its City Charter, Section A8.409-4. This section provides for impasse resolution procedures. Unresolved bargaining disputes shall be submitted to a three-member arbitration panel, upon the declaration of impasse by the CCSF or by a recognized employee organization involved in the dispute. The ultimate decision of the arbitration board is final and binding.[6]

---

[5] In its position statement dated February 18, 2014, the OCII states that it is willing to participate in factfinding upon the condition that the factfinding process will be between the OCII and SEIU only.

[6] The charter section further provides that the arbitration procedings are governed by the Code of Civil Procedure, sections 1280 et seq.

Accordingly, the CCSF—a charter city and county—has, in its charter, a procedure that applies if an impasse is reached between the CCSF and its recognized employee organizations (i.e., SEIU and/or IFPTE Local 21). The charter further provides for final and binding arbitration. Therefore, under MMBA section 3505.5, subdivision (e), the CCSF is not subject to the factfinding provision of the MMBA.

The unions argue that the section 3505.5, subdivision (e) exemption does not apply because these negotiations are not ones "to which the impasse procedure applies." The unions assert that they believe that the CCSF would refuse to participate in the binding arbitration procedure provided for by the Charter and that the CCSF has taken the position that the Charter impasse procedures do not apply to the bargaining. However, to the extent that the CCSF is required to bargain with SEIU and IFPTE Local 21, it is covered by the charter arbitration exception of MMBA section 3505.5, subdivision (e), and not by the MMBA factfinding provisions.

Accordingly, as to the CCSF, the instant factfinding request does not satisfy the requirements of MMBA sections 3505.4 and 3505.5, and PERB Regulation 32802.

Next Steps

As to the OCII, the instant request satisfies the requirements of PERB Regulation 32802 in that it was timely filed, based upon a written notice of declaration of impasse, and identifies the dispute subject to factfinding. Each party must select its factfinding panel member and notify this office in writing of his/her name, title, address and telephone number no later than March 4, 2014.[7] Service and proof of service are required.

The résumés of seven factfinders, drawn from the PERB Panel of Neutrals, are being provided to the parties via electronic mail.[8] The parties may mutually agree upon one of the seven, or may select any person they choose, whether included on the PERB Panel of Neutrals or not. In no case, however, will the Board be responsible for the costs of the chairperson.

If the parties select a chair, the parties should confirm the availability of the neutral, *prior* to informing PERB of the selection.

Unless the parties notify PERB, on or before March 4, 2014, that they have mutually agreed upon a person to chair their factfinding panel, PERB will appoint one of these seven individuals to serve as chairperson.

---

[7] This deadline, and any other referenced, may be extended by mutual agreement of the parties.

[8] The seven neutrals whose résumés are being provided are Norman Brand, Jerilou Cossack, Ruth Glick, Robert Hirsch, John Kagel, Wilma Rader, and Paul Roose.

Right to Appeal

Pursuant to PERB Regulations, an aggrieved party may file an appeal directly with the Board itself and can request an expedited review of this administrative determination. (Cal. Code Regs., tit. 8, §§ 32147, subd. (a), 32350, 32360, 32802, 61060.) An appeal must be filed with the Board itself within 10 days following the date of service of this determination. (Cal. Code Regs., tit. 8, § 32360, subd. (b).) Any document filed with the Board must contain the case name and number, and the original and five (5) copies of all documents must be provided to the Board. (*Ibid.*)

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

The Board's address is:

Public Employment Relations Board
Attention: Appeals Assistant
1031 18th Street
Sacramento, CA 95811-4124
(916) 322-8231
FAX: (916) 327-7960

If a party appeals this determination, the other party(ies) may file with the Board an original and five copies of a statement in opposition within 10 calendar days following the date of service of the appeal. (Cal. Code Regs., tit. 8, § 32375.)

Service

All documents authorized to be filed herein must also be "served" upon all parties to the proceeding, and a "proof of service" must accompany each copy of a document served upon a party or filed with the Board itself. (See Cal. Code Regs., tit. 8, § 32140 for the required contents.) The document will be considered properly "served" when personally delivered or deposited in the mail or deposited with a delivery service and properly addressed. A document may also be concurrently served via facsimile transmission on all parties to the proceeding. (Cal. Code Regs., tit. 8, § 32135, subd. (c).)

Extension of Time

A request for an extension of time, in which to file a document with the Board itself, must be in writing and filed with the Board at the previously noted address. A request for an extension must be filed at least three (3) calendar days before the expiration of the time required for filing the document. The request must indicate good cause for and, if known, the position of each other party regarding the extension, and shall be accompanied by proof of service of the request upon each party. (Cal. Code Regs., tit. 8, § 32132.)

Sincerely,

Laura Z. Davis
Senior Regional Attorney

LD

cc: Peter Saltzman, IFPTE Local 21
Ana Guzina, IFPTE Local 21

PUBLIC EMPLOYMENT RELATIONS BOARD

San Francisco Regional Office
1330 Broadway, Suite 1532
Oakland, CA 94612-2514
Telephone: (510) 622-1021
Fax: (510) 622-1027

February 25, 2014

Peter Saltzman, Attorney
Leonard Carder
1330 Broadway, Suite 1450
Oakland, CA 94612-2513

Rafal Ofierski, Deputy City Attorney
City & County of San Francisco
1390 Market Street, 5th Floor
San Francisco, CA 94102

Jeffrey Sloan, Attorney
Renne, Sloan, Holtzman & Sakai
350 Sansome Street, Suite 300
San Francisco, CA 94104-1304

Re: *City & County of San Francisco and Office of Community Investments & Infrastructure and IFPTE, Local 21, AFL-CIO*
Case No. SF-IM-141-M
MMBA Factfinding Request (OCII)
Administrative Determination

Dear Interested Parties:

On February 12, 2014, the International Federation of Professional and Technical Engineers, Local 21 (IFPTE Local 21) filed a request for factfinding with the Public Employment Relations Board (PERB or Board) pursuant to section 3505.4 of the Meyers-Milias-Brown Act (MMBA) and PERB Regulation 32802.[1] IFPTE Local 21 asserts that it and joint employers Office of Community Investments and Infrastructure (OCII) and the City and County of San Francisco (CCSF) have been unable to effect a settlement in their current negotiations for a successor agreement. The OCII gave written notice of declaration of impasse by letter dated January 14, 2014.

On February 18, 2014, the OCII, through its attorney, Jeffrey Sloan, provided a position statement. On February 18, 2014, the CCSF, through its attorney Rafal Ofierski, also provided a position statement. IFPTE Local 21, through its attorney Peter Saltzman, provided a position statement on February 19, 2014.

[1] The MMBA is codified at Government Code section 3500 et seq. PERB Regulations are codified at California Code of Regulations, title 8, section 31001 et seq. The text of the MMBA and PERB Regulations may be found at www.perb.ca.gov.

A separate factfinding request has been filed by the Service Employees International Union Local 1021 (SEIU) against both the OCII and the CCSF. This factfinding request, case number SF-IM-140-M, will be addressed by a separate document. Official notice is taken of the documents filed in case number SF-IM-140-M, particularly the request for official notice filed by SEIU on February 13, 2014, and position statements filed by SEIU on February 15 and February 19, 2014.

Factual Background

The OCII is a successor agency to the former San Francisco Redevelopment Agency. Due to this transformation, as well as recent statutory changes, the correct identity of the "employer," and/or the existence of a "joint employer" is currently in dispute between the parties. Specifically, the issue is whether the bargaining unit members (of both IFPTE Local 21 and SEIU) should be considered employees of the CCSF, the OCII, or both. This dispute over employer identity is a central issue in pending unfair practice charge *IFPTE Local 21 and SEIU Local 1021 v. City and County of San Francisco*, PERB UPC Case Number SF-CE-1109-M.[2]

In 2011, the California Legislature enacted Assembly Bills Nos. 26 and 27 (2011-2012 1st Ex. Sess.), which dissolved existing redevelopment agencies and transferred their assets and obligations to "successor agencies." This enactment was upheld, in relevant part, in *California Redevelopment Assn. v. Motosantos* (2011) 53 Cal.4th 231. In June 2012, the Legislature enacted Assembly Bill 1484 (2011-2012 Regular Sess.) which, among other things, clarified the definition of "successor agency." (See, e.g., Health & Saf. Code, § 34173.) In approximately September 2012, the CCSF Board of Supervisors then passed City Ordinance number 215-12 concerning the status of the successor agency, later known as the OCII. This resulted in a dispute among the parties as to the correct identity of the employer of the employees in the SEIU and IFPTE Local 21 bargaining units

On an unspecified date, representatives of OCII and/or CCSF began meeting and negotiating with SEIU and IFPTE Local 21 over a successor Memorandum of Understanding (MOU). While SEIU and IFPTE Local 21 represent separate bargaining units, joint bargaining sessions have been conducted with the two unions together.

Ground rules for the joint negotiations were prepared on CCSF Department of Human Resources letterhead, and signed on July 24, 2012, by Carol Isen[3] on behalf of the CCSF. These ground rules were also signed, on the same day, by Alex Tonisson for IFPTE Local 21 and by Leah Berlanga for SEIU. Ms. Isen later submitted a verification dated September 27, 2013, in connection with UPC Case No. SF-CE-1109-M, stating that she had been serving as

[2] This charge is presently under investigation by the Office of the General Counsel. PERB takes official notice of the case file in this action.

[3] Ms. Isen's title is not specified.

the labor relations representative for the successor agency to the San Francisco Redevelopment Agency. Ms. Isen submitted a second verification dated January 10, 2014, stating that she was an employee relations representative with the City and County of San Francisco. Accordingly, it is unknown whether she was agreeing to the ground rules on behalf of the CCSF or on behalf of the OCII.

According to IFPTE Local 21 and SEIU, the CCSF Department of Human Resources served as the labor relations representative for the Redevelopment Agency until late 2013. Further, SEIU and IFPTE Local 21 assert that the CCSF has exercised significant control over the negotiations. It appears that SEIU and IFPTE Local 21 engaged in bargaining with the OCII, but expressly reserved their rights as to their argument that the CCSF should also be a participant. Mr. Sloan indicates that he served as chief negotiator for the OCII.

The parties' last meeting was on January 9, 2014. No agreement was reached at this meeting, and the OCII verbally declared that it believed the parties were at impasse. According to the OCII, the parties also severed, pursuant to the ground rules, what had previously been joint negotiations with both unions.

On January 14, 2014, the OCII, through its attorney and chief negotiator Mr. Sloan, sent IFPTE Local 21 representative Mr. Tonisson a written notice of declaration of impasse. The parties did not agree to mediate the dispute. On January 23, 2014, Mr. Sloan sent a second letter confirming the previous declaration of impasse.

Discussion

MMBA section 3505.4, subdivision (a),[4] provides as follows:

> The employee organization may request that the parties' differences be submitted to a factfinding panel . . . If the dispute was not submitted to mediation, an employee organization may request that the parties' differences be submitted to a factfinding panel not later than 30 days following the date that either party provided the other with a written notice of a declaration of impasse. . . .

PERB Regulation 32802 provides as follows:

[4] The factfinding provisions were added to the MMBA by Assembly Bill 646 (Stats. 2011, Ch. 680, § 2) and amended by Assembly Bill 1606 (Stats. 2012, Ch. 314, § 1.) The amendment, which added the language about either party providing written notice of declaration of impasse, was intended to be technical and clarifying of existing law. (Stats. 2012, Ch. 314, § 2.)

> (a) An exclusive representative may request that the parties' differences be submitted to a factfinding panel. The request shall be accompanied by a statement that the parties have been unable to effect a settlement. Such a request may be filed:
>
> (1) Not sooner than 30 days, but not more than 45 days, following the appointment or selection of a mediator pursuant either to the parties' agreement to mediate or a mediation process required by a public agency's local rules; or
>
> (2) If the dispute was not submitted to mediation, not later than 30 days following the date that either party provided the other with written notice of a declaration of impasse.

The parties did not submit the bargaining dispute to mediation or select a mediator. Therefore, IFPTE Local 21's factfinding request is based upon the written notice of a declaration of impasse by OCII.[5] It appears that there has been no written notice of declaration of impasse with respect to bargaining with the CCSF. The OCII's letter dated January 14, 2014, constitutes a written notice of declaration of impasse, with respect to the OCII, within the meaning of section 3505.4. The instant factfinding request was timely filed within thirty days, on February 12, 2014.

2. Charter Arbitration Exception to MMBA Factfinding

MMBA section 3505.5, subdivision (e), provides as follows:

> A charter city, charter county, or charter city and county with a charter that has a procedure that applies if an impasse has been reached between the public agency and a bargaining unit, and the procedure includes, at a minimum, a process for binding arbitration, is exempt from the requirements of this section and Section 3505.4 with regard to its negotiations with a bargaining unit to which the impasse procedure applies.

The CCSF provides a copy of its City Charter, Section A8.409-4. This section provides for impasse resolution procedures. Unresolved bargaining disputes shall be submitted to a three-member arbitration panel, upon the declaration of impasse by the CCSF or by a recognized

[5] In its position statement dated February 18, 2014, the OCII states that it is willing to participate in factfinding upon the condition that the factfinding process will be between the OCII and IFPTE Local 21 only.

employee organization involved in the dispute. The ultimate decision of the arbitration board is final and binding.[6]

Accordingly, the CCSF—a charter city and county—has, in its charter, a procedure that applies if an impasse is reached between the CCSF and its recognized employee organizations (i.e., SEIU and/or IFPTE Local 21). The charter further provides for final and binding arbitration. Therefore, under MMBA section 3505.5, subdivision (e), the CCSF is not subject to the factfinding provision of the MMBA.

The unions argue that the section 3505.5, subdivision (e) exemption does not apply because these negotiations are not ones "to which the impasse procedure applies." The unions assert that they believe that the CCSF would refuse to participate in the binding arbitration procedure provided for by the Charter and that the CCSF has taken the position that the Charter impasse procedures do not apply to the bargaining. However, to the extent that the CCSF is required to bargain with SEIU and IFPTE Local 21, it is covered by the charter arbitration exception of MMBA section 3505.5, subdivision (e), and not by the MMBA factfinding provisions.

Accordingly, as to the CCSF, the instant factfinding request does not satisfy the requirements of MMBA sections 3505.4 and 3505.5, and PERB Regulation 32802.

Next Steps

As to the OCII, the instant request satisfies the requirements of PERB Regulation 32802 in that it was timely filed, based upon a written notice of declaration of impasse, and identifies the dispute subject to factfinding. Each party must select its factfinding panel member and notify this office in writing of his/her name, title, address and telephone number no later than March 4, 2014.[7] Service and proof of service are required.

The résumés of seven factfinders, drawn from the PERB Panel of Neutrals, are being provided to the parties via electronic mail.[8] The parties may mutually agree upon one of the seven, or may select any person they choose, whether included on the PERB Panel of Neutrals or not. In no case, however, will the Board be responsible for the costs of the chairperson.

If the parties select a chair, the parties should confirm the availability of the neutral, *prior* to informing PERB of the selection.

---

[6] The charter section further provides that the arbitration procedings are governed by the Code of Civil Procedure, sections 1280 et seq.

[7] This deadline, and any other referenced, may be extended by mutual agreement of the parties.

[8] The seven neutrals whose résumés are being provided are Norman Brand, Jerilou Cossack, Ruth Glick, Robert Hirsch, John Kagel, Wilma Rader, and Paul Roose.

Unless the parties notify PERB, on or before March 4, 2014, that they have mutually agreed upon a person to chair their factfinding panel, PERB will appoint one of these seven individuals to serve as chairperson.

Right to Appeal

Pursuant to PERB Regulations, an aggrieved party may file an appeal directly with the Board itself and can request an expedited review of this administrative determination. (Cal. Code Regs., tit. 8, §§ 32147, subd. (a), 32350, 32360, 32802, 61060.) An appeal must be filed with the Board itself within 10 days following the date of service of this determination. (Cal. Code Regs., tit. 8, § 32360, subd. (b).) Any document filed with the Board must contain the case name and number, and the original and five (5) copies of all documents must be provided to the Board. (*Ibid.*)

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

The Board's address is:

Public Employment Relations Board
Attention: Appeals Assistant
1031 18th Street
Sacramento, CA 95811-4124
(916) 322-8231
FAX: (916) 327-7960

If a party appeals this determination, the other party(ies) may file with the Board an original and five copies of a statement in opposition within 10 calendar days following the date of service of the appeal. (Cal. Code Regs., tit. 8, § 32375.)

Service

All documents authorized to be filed herein must also be "served" upon all parties to the proceeding, and a "proof of service" must accompany each copy of a document served upon a party or filed with the Board itself. (See Cal. Code Regs., tit. 8, § 32140 for the required contents.) The document will be considered properly "served" when personally delivered or deposited in the mail or deposited with a delivery service and properly addressed. A document may also be concurrently served via facsimile transmission on all parties to the proceeding. (Cal. Code Regs., tit. 8, § 32135, subd. (c).)

Extension of Time

A request for an extension of time, in which to file a document with the Board itself, must be in writing and filed with the Board at the previously noted address. A request for an extension must be filed at least three (3) calendar days before the expiration of the time required for filing the document. The request must indicate good cause for and, if known, the position of each other party regarding the extension, and shall be accompanied by proof of service of the request upon each party. (Cal. Code Regs., tit. 8, § 32132.)

Sincerely,

Laura Z. Davis
Senior Regional Attorney

LD

cc: Kerianne Steele, SEIU
Ana Guzina, IFPTE Local 21