STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD

CITY & COUNTY OF SAN FRANCISCO, Employer, and SERVICE EMPLOYEES INTERNATIONAL UNION, LOCAL 1021, Exclusive Representative.	Case No. SF-IM-145-M Administrative Appeal PERB Order No. Ad-419-M November 24, 2014

Appearances: Amy D. Super, Deputy City Attorney, for City & County of San Francisco; Weinberg, Roger & Rosenfeld by Robert E. Szykowny, Attorney, for Service Employees International Union, Local 1021.

Before Martinez, Chair; Winslow and Banks, Members.

DECISION

WINSLOW, Member: This case is before the Public Employment Relations Board (PERB or Board) on an appeal by the City & County of San Francisco (City) from an administrative determination (attached) made by the PERB's Office of the General Counsel that factfinding procedures defined in the Meyers-Milias-Brown Act (MMBA) section 3505.4[1] and PERB Regulation 32802[2] applied to the bargaining impasse between the City and Service Employees International Union, Local 1021 (SEIU).[3] The bargaining dispute concerned the effects on employees' terms and conditions of employment of the City's decision to institute

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

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

[3] Statutory references are to the Government Code unless otherwise noted. MMBA section 3505.4 establishes a non-binding factfinding procedure for resolving post-impasse bargaining disputes that may be invoked by the representative employee organization after mediation efforts, if available, have failed to produce a settlement.

biometric time clocks at the City's Fine Arts Museums (FAMs). The City has also requested that PERB stay the administrative determination pursuant to PERB Regulation 32370.[4]

Based on our recent decision in *County of Contra Costa* (2014) PERB Decision No. Ad-410-M (*Contra Costa*) in which we held that the factfinding procedures set forth in MMBA sections 3505.4 through 3505.7 apply to bargaining disputes over all matters within the scope of representation, we affirm the administrative determination.

FACTUAL SUMMARY

PERB's Office of the General Counsel made a finding of the following facts, which were undisputed by either party. Sometime in May 2012, the City notified SEIU of its intent to implement a biometric time-keeping system (i.e., time clocks using employee fingerprints) at its FAMs. The City again provided notice to SEIU in March 2013.

The City and SEIU met and conferred over the effects of the City's decision between March and June 2013. The focus of these sessions was on the effects on employee privacy raised by SEIU. The parties met three times, but no agreement was reached. On July 1, 2014, the City notified SEIU that it intended to implement its decision to install the biometric time-keeping system on August 1, 2014, as it believed the meet-and-confer process had concluded.

By letter dated July 11, 2014, SEIU representative, David Canham (Canham), notified FAMs Human Resources Director Charlie Castillo (Castillo) that SEIU did not believe the meet-and-confer process had ended, and asserted that other negotiable effects of the decision to implement the time-keeping system had yet to be addressed, including discipline issues, a grace period within which employees would be allowed to clock in, and how employees would

[4] PERB Regulation 32370 states that an appeal from an administrative decision will not automatically prevent the Board from proceeding in a case, but parties may seek a stay of any activity. "The Board may stay the matter, except as is otherwise provided in these regulations."

be notified if they were determined to be tardy. The letter concluded by requesting further bargaining sessions and offering three dates in July when SEIU would be available to meet.

On July 16, 2014, Castillo sent an e-mail message to Canham and others, stating as follows:

> As outlined in my July 1, 2014 letter, the department has meet [*sic*] its obligation under the MMBA. The department and the City have met in good faith regarding all the issues outlined in Mr. Canham's letter going all the way back to 2012. We are at an impasse. Should you want to meet regarding any other issue that the Union may feel is unresolved, I would be amenable to a meeting.

(Exh. C to City's Appeal, emphasis added.)

On July 25, 2014, City Employee Relations Director Martin Gran (Gran) sent an e-mail message to multiple recipients, including SEIU representative Larry Bradshaw. Gran stated that meet-and-confer sessions over impacts of the biometric time clocks concluded in June 2013, that SEIU raised additional impact issues in July 2014, and that the City was available to meet to discuss these new issues, but that the City intended to implement the time clocks on August 1, 2014.

PROCEDURAL HISTORY

SEIU filed its request for factfinding on July 24, 2014, pursuant to MMBA section 3505.4, claiming that the City declared impasse on July 16, 2014.[5] On July 30, 2014, the City filed a letter objecting to SEIU's request on the grounds that: (1) the request was moot in light of the City's subsequent offer to meet with SEIU to discuss newly-raised effects of the City's decision to implement biometric time clocks in the FAMs; (2) the request was improper to the extent SEIU was objecting to the decision itself, which PERB has found to be a

[5] MMBA section 3505.4(a) provides that an employee organization may request factfinding, but must do so within 30 days of the declaration of impasse if the parties have not submitted their dispute to mediation. (See also PERB Reg. 32802(a)(2).)

management right; and (3) the dispute is not a proper subject for factfinding, since factfinding under MMBA exclusively applies to impasses in disputes arising from negotiations over a new or successor memorandum of understanding (MOU). On July 31, 2014, SEIU filed a reply in opposition to the City's objections. On July 31, 2014, PERB's Office of the General Counsel approved SEIU's request and so informed the parties by e-mail. The administrative determination followed on August 5, 2014.

ADMINISTRATIVE DETERMINATION

The Office of the General Counsel, citing to our decisions in *Contra Costa, supra,* PERB Order No. Ad-410-M and *County of Fresno* (2014) PERB Order No. Ad-414-M[6] (*Fresno*) rejected the City's objections to factfinding, concluding that Assembly Bill 646 (AB 646)[7] applies to all bargaining disputes concerning matters within the scope of representation, and is not limited only to bargaining disputes over a comprehensive MOU. The Office of the General Counsel noted that the duty to bargain includes the duty to negotiate over the implementation and foreseeable effects and impacts of managerial decisions not otherwise subject to the process of collective bargaining, such as layoffs, staffing levels, employee background checks, and additional educational programs.

The Office of the General Counsel concluded that in its July 16, 2014 letter to SEIU, the City declared impasse in negotiations over the effects of the biometric time-keeping system. It was also determined that SEIU's factfinding request was timely.

[6] *Fresno* is currently pending before a California superior court on a writ of mandate filed by the County of Fresno challenging PERB Order No. Ad-414-M.

[7] AB 646, passed in 2011, amended the MMBA by adding sections 3505.4 through 3505.7 to provide for a factfinding procedure if requested by the exclusive representative after declaration of impasse.

The Office of the General Counsel also concluded that the City's July 25, 2014, offer to meet to discuss additional impacts did not change the fact that the City had already provided a written declaration of impasse.

The Office of the General Counsel noted that SEIU's request for factfinding identifies the type of dispute as "employer implementing bio metric time clocks and new basis of discipline." After reviewing related correspondence submitted by both parties, the Office of the General Counsel concluded that it appeared that the parties had engaged in meeting and conferring regarding the effects of the employer's decision to use the new biometric time-keeping system, and that SEIU did not appear to contend that the decision itself is subject to the duty to bargain.

Having concluded that the factfinding procedures set forth in MMBA section 3505.4 were applicable to this dispute, the Office of the General Counsel ordered each party to select its factfinding panel member and notify the Office of the General Counsel of the selection by August 12, 2014.

The City filed a timely appeal from this administrative determination.

THE CITY'S APPEAL

The City urges the Board to reverse the administrative determination on several grounds, nearly all of which were addressed by this Board in *Contra Costa, supra,* PERB Order No. Ad-410-M.[8] The City asserts that PERB is bound by the court orders in *County of Riverside v. PERB* (Riverside County Superior Court Case No. RIC 1305661) (*Riverside*), which enjoined PERB from approving any factfinding request in any bargaining dispute other than for a new or successor comprehensive MOU; and in *San Diego Housing Commission v.*

[8] The one argument that is unique to this case is the City's claim that SEIU's factfinding request is moot because the parties have apparently met and conferred concerning additional effects of the biometric time-keeping system after August 1, 2014. We address that claim later in this decision.

PERB (San Diego County Superior Court Case No. 37-2012-00087278) (*San Diego*), which ordered PERB to dismiss the factfinding request in that case, as well as any other factfinding requests involving *San Diego* and SEIU, Local 221, other than in a dispute arising from the negotiation of a new or successor MOU. According to the City, PERB is enjoined from ordering factfinding in this matter, because it is subject to an order in *Riverside* that is not stayed pending PERB's appeal of the superior court's order in *Riverside.*

The City asserts that PERB is prohibited from ordering factfinding on this matter, because it does not arise out of collecting bargaining for a new or successor MOU. According to the City, the plain meaning of the MMBA and legislative intent of AB 646 demonstrate that factfinding only applies to new or successor MOU negotiations. The City also argues that the Board lacks jurisdiction to consider this matter, because any Board decision other than one rendered as a result of unfair practice proceedings would constitute an advisory opinion.

According to the City, consideration of the administrative determination would violate basic notions of fairness and due process, because the Office of the General Counsel, which has defended PERB in the *Riverside* and *San Diego* litigation, has also made this administrative determination.

The City also argues that the factfinding process unconstitutionally interferes with the City's right to manage its finances and determine the compensation of its employees.

Lastly, the City urges that the administrative determination be vacated because it and SEIU's request are moot by virtue of the fact that the parties resumed negotiations subsequent to the City's declaration of impasse.

SEIU'S RESPONSE

SEIU urges that the administrative determination be upheld based on our previous holdings in *Contra Costa, supra,* PERB Order No. Ad-410-M and *Fresno, supra,* PERB Order

No. Ad-414-M. SEIU asserts that PERB has jurisdiction in this matter, because PERB Regulations 32350 and 32360 allow the Board to consider appeals from administrative determinations of a Board agent. SEIU also asserts that the administrative determination is not an advisory opinion.

SEIU also asserts that PERB is not bound by the court orders in *Riverside* or *San Diego*, because both decisions are currently on appeal, staying the effectiveness of the decisions in those cases until they are finally determined by appellate courts, and because the doctrines of res judicata and collateral estoppel do not apply until and unless a court decision is final.

Addressing the merits, SEIU argues that AB 646 was intended to apply to bargaining disputes such as the one presented by this case.

SEIU asserts that PERB's consideration of the administrative determination does not violate basic notions of fairness and due process, because the Office of the General Counsel may defend PERB in litigation even if the same issues are subsequently presented to the Board itself by appeals of administrative determinations.

According to SEIU, AB 646 is not unconstitutional because it does not interfere with the ultimate decision-making authority of public agencies to determine wages or manage their finances.

Responding to the City's claim that the factfinding request is moot, SEIU denies that the dispute is moot merely because the City resumed negotiations with SEIU after the City unilaterally implemented use of the biometric time clocks on August 1, 2014. SEIU asserts that after the City declared impasse and unilaterally implemented the biometric time clocks, the City cannot "undeclare" impasse, since its actions have already harmed the collective bargaining process.

DISCUSSION

The Board's Jurisdiction to Administer Factfinding Under the MMBA

The City makes two claims in its objection to PERB's jurisdiction. It first asserts that MMBA section 3509(b) provides that alleged violations of the MMBA shall be processed as unfair practices charges, implying that PERB may not "enforce" the MMBA by any means other than an unfair practice charge.

We have addressed this claim in two recent decisions, neither of which the City has cited or distinguished in its appeal.[9] In *Contra Costa, supra,* PERB Order No. Ad-410-M, pp. 12-13, fn. 8, we noted the difference between an administrative determination that orders the parties to participate in factfinding and an unfair practice proceeding that determines liability for violations of the MMBA. In responding to the employer's argument in *Contra Costa,* we also noted that unfair practice proceedings are not the only manner in which PERB is authorized to administer the MMBA. (MMBA, § 3509; EERA, § 3541.3.[10]) We also explained in *City of Redondo Beach* (2014) PERB Order No. Ad-409-M, p. 5 (*Redondo Beach*) that MMBA section 3509 is not the source of PERB's authority to appoint a factfinding panel. That authority derives from MMBA section 3505.4, and is not predicated on an alleged violation of the MMBA. As in *Contra Costa,* PERB's determination of SEIU's factfinding request does not result in any determination that the City violated the MMBA.

The City also claims that this matter is not properly before the Board, because the administrative determination is an invalid advisory decision. According to the City, the only situation in which this Board may determine whether factfinding applies to the parties'

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[9] *Contra Costa, supra,* PERB Order No. Ad-410-M, issued on April 16, 2014 and *Redondo Beach, supra,* PERB Order No. Ad-409-M, issued on April 9, 2014, each before the City's appeal was filed on August 18, 2014.

[10] Educational Employment Relations Act (EERA) is codified at Government Code section 3540 et seq.

bargaining dispute is in the context of unfair practice proceedings. The City asserts that to give the administrative determination the force of law or the basis for PERB Board precedent would deny the City an opportunity to have a fair hearing and present evidence in front of a neutral administrative law judge on the issue. We disagree.

As we explained in *Contra Costa, supra,* PERB Order No. Ad-410-M, pp. 11-12, PERB has jurisdiction to determine whether the provisions of MMBA section 3505.4 apply to a particular factfinding request, and PERB Regulation 32802(c) directs the Board to notify the parties whether a request for factfinding has met the requirements of subsection (a)(1) or (2) of PERB Regulation 32802. Whether a factfinding request is sufficient is determined on a case-by-case basis. Contrary to the City's claim, a determination by the Office of the General Counsel or by the Board itself that a factfinding request has met the statutory requirements is not a determination that the employer has violated the MMBA. (*City & County of San Francisco* (2014) PERB Order No. Ad-415-M, pp. 12-13; *Contra Costa*, p. 12.) The administrative determination in this case was based on a review of the facts and an analysis of the law, and it resulted in a direction to the parties to implement the next steps in the factfinding process. In sum, there was nothing "advisory" about the administrative determination.

Nor is a ruling by the Board itself on the City's appeal of the administrative determination an advisory opinion.[11] The City has appealed the administrative determination, presumably seeking an order from the Board itself overturning the administrative determination and absolving the City of the duty to participate in factfinding. Such an order

[11] PERB does not render advisory opinions, but instead exercises its adjudicatory function through decisions resolving actual controversies between the parties concerning findings of facts and/or conclusions of law. (*Santa Clarita Community College District (College of the Canyons)* (2003) PERB Decision No. 1506, pp. 27-28, and cases cited therein.)

would not be theoretical or advisory, since it would resolve an actual, concrete dispute between the parties. We conclude, therefore that our decision resolving the City's appeal is not an advisory opinion.

The issue before us in the instant case is simply whether the Office of the General Counsel correctly determined that the factfinding process applied to this bargaining dispute. The outcome of this case is an order directing the parties to select their respective members of the factfinding panel and proceed to factfinding, a process that may assist the parties in reaching agreement pursuant to the factfinding panel's recommended terms of settlement. The recommended terms of settlement are not binding on the parties. Unlike a remedy in an unfair practice proceeding, which could result in an order to rescind unilateral changes if the employer is determined to have violated the MMBA, an order resolving the issues raised by this appeal does not dictate a particular outcome to the underlying bargaining dispute.

In sum, PERB's determination of the issues presented in this case is not an advisory opinion.

Effect of Superior Court Decisions In *Riverside* and *San Diego*

The City asserts that PERB is bound by two superior court decisions by application of the doctrine of collateral estoppel and res judicata and because, according to the City, the order from the *Riverside* court is not stayed on appeal.[12] We first address the City's collateral estoppel/res judicata argument.

The City asserts that PERB is bound by the orders from each of these courts, and by the doctrine of collateral estoppel, which "bars PERB through its General Counsel's Office now or in subsequent litigation from re-litigating issues that were already determined in prior court actions." (Appeal of Admin. Deter., p. 9.) This claim is patently frivolous. As the City itself

[12] The other superior court decision the City references is *San Diego.*

acknowledges, a necessary element of the doctrine of collateral estoppel or res judicata is that the proceeding has ended with a final judgment on the merits.[13] The City knows, at least in the *Riverside* case, that the matter is on appeal, because it included in its submission to PERB copies of PERB's notices of appeal. PERB filed its notice of appeal in the *San Diego* litigation on July 7, 2014. Therefore, there is no final judgment on the merits in either of these cases.[14]

The City also asserts that PERB is bound by the superior court's injunction and issuance of a writ of mandate in *Riverside*. Code of Civil Procedure section 916, which stays injunctions on appeal, does not apply, according to the City, because the *Riverside* injunction is, in part, prohibitory. We reject this argument. First, for reasons discussed in *Contra Costa, supra,* PERB Order No. Ad-410-M, p. 13, the orders in the *Riverside* case are stayed. (Code of Civil Proc., § 916; *Varian Medical Systems, Inc. v. Delfino* (2005) 35 Cal.4th 180, 189-190; *Private Investors v. Homestake Mining Co.* (1936) 11 Cal.App.2d 488.)[15]

Second, the Court of Appeal, Fourth Appellate District, Division Two, which currently has jurisdiction of the *Riverside* case, summarily denied the County of Riverside's petition for a writ of supersedeas which sought to compel PERB to comply with the superior court's orders pending the appeal. (See Fourth App. Dist., Div. 2 Dock., E060047, January 7, and 14, 2014.)

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[13] 7 Witkin, California Procedure (5th ed. 2008) Judgment, section 364. (See also Appeal of Admin. Deter., p. 9.)

[14] There is one decision on the merits that is final, and that is *Contra Costa, supra,* PERB Order No. Ad-410-M.

[15] The City claims, erroneously, that PERB did not appeal the order of the Riverside Superior Court granting the County of Riverside's petition for a writ of mandate. On November 20, 2013, PERB filed an amended notice of appeal, superseding the notice of appeal filed on November 15, 2013. The amended notice clearly gives notice of appeal of both the "Order Granting Mandatory and Prohibitory Injunction" and an "Order Granting Peremptory Writ of Mandate and/or Writ of Prohibition." (Clerk's Transcript, vol. 9, pp. 2225-2246 in Case No. E060047, Ct. of Appeal of the State of California, Fourth App. Dist., Division Two.)

Thus, according to the Court of Appeal for the Fourth Appellate District, Division Two, the orders of the Riverside Superior Court are stayed pending appeal.

To the extent the City claims that PERB is bound by the order from the San Diego Superior Court, a matter also on appeal, we reject such claim. In addition to the lack of finality of judgment in *San Diego*, the plain terms of the superior court's judgment and writ of mandate limit its order against PERB to matters solely concerning the parties to that action, and impose no limitations on PERB's actions regarding other parties. Even if the judgment in *San Diego* were not stayed, it would not apply to the benefit of the City, which was not a party to that litigation.

Factfinding Procedures Apply to All Bargaining Disputes Over Negotiable Matters

As did the employer in *Contra Costa, supra,* PERB Order No. Ad-410-M, the City here argues that the legislative history of AB 646 indicates that it was intended to apply only to impasses in negotiations for new or successor MOUs, and not to impasses in bargaining over mid-term reopeners, or the effects of non-mandatory subjects of bargaining, such as the implementation of biometric time clocks, or other single-issue disputes.

These arguments were addressed and resolved in *Contra Costa, supra,* PERB Order No. Ad-410-M. In that case, we determined that the plain meaning of AB 646 did not limit factfinding procedures only to impasses in negotiations for comprehensive MOUs. (*Contra Costa*, p. 32.) Nevertheless, we reviewed the legislative history of AB 646, and rejected the employer's claim, repeated in this case, that comments by the author of AB 646 were dispositive that the bill was intended only for disputes over comprehensive MOUs. It is well-settled that a single legislator's comments, even the author's, cannot be relied on for legislative history, because they do not necessarily represent the intent of the Legislature as a whole. (*Contra Costa*, p. 34.) We also reviewed various summaries of AB 646 as it moved

through the Legislature, noting changes in those summaries from describing factfinding as a procedure parties may engage in "if they are unable to reach a collective bargaining agreement," to permitting factfinding "if a mediator is unable to reach a settlement" or a "settlement of a labor dispute." (*Contra Costa*, pp. 34-35, emphasis in original.)

We also considered in *Contra Costa, supra,* PERB Order No. Ad-410-M, the contention, repeated here, that the placement of the language of AB 646 following the portion of MMBA section 3505 concerning the duty to meet and confer in good faith meant that AB 646 applies only to comprehensive MOUs. (*Contra Costa*, pp. 37-42.) We rejected that argument, concluding:

> It is logical for the Legislature to have codified AB 646 within this part of the MMBA because the leading provision, MMBA section 3505, establishes the duty to meet and confer in good faith, and subsequent provisions prescribe certain procedures concerning bargaining. We do not find that the codification of AB 646 within that part of the MMBA that describes bargaining generally indicates the Legislature's intent to confine factfinding only to comprehensive MOU negotiations, especially where other subsections of MMBA section 3505 do not limit negotiations only to such comprehensive agreements.

(*Contra Costa,* pp. 39-40.)

Contra Costa, supra, PERB Order No. Ad-410-M also addressed the argument, repeated here, that the enumeration in MMBA section 3505.4(c) of eight criteria that the factfinding panel must consider supports its view that factfinding applies only to comprehensive MOUs. (*Contra Costa*, pp. 42-44.) We noted that these are virtually the same criteria enumerated in Educational Employment Relations Act (EERA),[16] and it is well-established that under EERA, factfinding has been applied to single-issue disputes, mid-term negotiations and effects bargaining. Common sense does not require that each of these criteria

[16] EERA is codified at Government Code secion 3540 et seq.

be applied in every bargaining dispute. Depending on the dispute, some criteria may be more relevant than others.

Even in a factfinding proceeding concerning a new or successor MOU, not every one of the eight criteria is necessarily applicable to the issues that divide the parties. When parties reach an impasse in negotiations over a comprehensive MOU, they have usually agreed to at least some terms prior to reaching impasse on more intractable proposals. Issues that impede final agreement can be economic, or non-economic, such as binding arbitration of grievances, transfer policies, or evaluation procedures. Where the issues are non-economic, it is unlikely the factfinding panel would spend time comparing wages and hours of comparable public agencies or assessing the consumer price index in arriving at its recommendations. Thus, the listing of eight criteria that factfinders are to consider does not demonstrate that factfinding applies only to comprehensive MOUs. As we pointed out in *Contra Costa, supra,* PERB Order No. Ad-410-M, pp. 48-49, mid-term bargaining disputes, or disputes over the effects of layoffs or some other proposed economic reduction, can involve issues that are just as complex as disputes over comprehensive MOUs. The eight listed criteria can be equally applicable or equally not applicable to any bargaining dispute, whether it be a mid-term re-opener, a single issue, effects bargaining, or a comprehensive MOU.

As we noted in *County of Contra Costa, supra,* AB 646 recognized that some charter cities and counties provide for binding arbitration as a means for resolving bargaining impasses, and in those instances, the factfinding process will not apply. (MMBA, § 3505.5(e).[17]) The City asserts that this accommodation to local rules further shows

[17] MMBA section 3505.5(e) provides, in pertinent part:

> A charter city, [or a] charter county . . . with a charter that has a procedure that applies if an impasse has been reached . . . and the procedure includes . . . a process for binding arbitration, is

legislative intent to limit factfinding only to negotiations for a comprehensive MOU. The City's argument assumes that the scope of binding arbitration under local rules is coterminous with the scope of factfinding under AB 646. It is noted that the text of subsection (e) does not limit the types of disputes subject to binding arbitration. It refers only to "impasse," which, as seen in the definition in EERA section 3540.1(f), uses the terms "dispute" and "differences," placing no limitation on the type of negotiations that may reach impasse.[18] It is true that this exemption contained in MMBA section 3505.5(e) exists because where an impasse is subject to a binding arbitration process, it need not also be subject to a factfinding process. Binding arbitration, after all, resolves a bargaining dispute with finality, negating the need for any additional advisory factfinding and recommendation process. It does not follow, however, that factfinding is therefore limited only to impasses over negotiations for a comprehensive MOU. The applicability of factfinding and the scope of factfinding are two, wholly distinct issues.

Fairness and Due Process

The City argues that consideration of the administrative determination would violate basic notions of fairness and due process because the Office of the General Counsel issued the administrative determination while concurrently representing PERB as a legal advocate in two superior court matters involving the same issue that is the subject of this appeal.

As we held in *Contra Costa*, *supra*, PERB Order No. Ad-410-M, p. 14, this argument ignores the statutory role of the Office of the General Counsel and misapprehends how the Office of the General Counsel and the Board itself function. Because the Office of the General Counsel has no role in advising the Board itself in its appellate function regarding cases

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> 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.

[18] PERB has applied EERA's definition of "impasse" to cases arising under the MMBA. (*City & County of San Francisco* (2009) PERB Decision No. 2041-M.)

pending before the Board, there is nothing improper about the Office of the General Counsel representing PERB in the *Riverside* or *San Diego* cases, or any other litigation seeking to halt PERB's administration of MMBA section 3505.4, even if the same issues are subsequently presented to the Board itself by appeals of administrative determinations.

Mootness of the Factfinding Request

The City argues that the parties' resumption of negotiations subsequent to the City's declaration of impasse and SEIU's factfinding request renders SEIU's factfinding request moot. However, the MMBA and PERB's regulations only condition factfinding on a declaration of impasse by one of the parties. Neither the MMBA nor PERB's regulations provide for a factfinding request being mooted by subsequent negotiations. Since the City declared impasse and SEIU requested factfinding, PERB has no authority to terminate that process.[19]

If the City believed the factfinding request was moot because of the parties' return to the table to negotiate over additional effects belatedly identified by SEIU, the City could have withdrawn its declaration of impasse. Having not done so, PERB must accept the declaration at face value, as the statutory and regulatory factfinding process under MMBA does not authorize PERB to independently determine whether an impasse exists.[20] This conclusion is bolstered by the language of MMBA section 3505.4(e), which states: "The procedural right of an employee organization to request a factfinding panel cannot be expressly or voluntarily waived." Thus, once impasse is declared, the exclusive representative has not only a right, but

[19] SEIU argues that the City's unilateral implementation of the biometric time clocks is further cause to prohibit the City from "undeclaring" impasse. However, whether or not the City has taken unilateral action is immaterial to whether or not it is obligated to engage in factfinding.

[20] Compare EERA, which explicitly permits the Board to determine whether a collective bargaining impasse exists. (EERA, § 3548.)

a strict window period within which to request factfinding. (*Redondo Beach, supra,* PERB Order No. Ad-409-M, pp. 6-7.)

SEIU objects to the City's claim of mootness on the grounds that impasse cannot be "undeclared." We disagree. Changed circumstances, such as significant concessions in negotiations by either party, may break an impasse. (*Public Employment Relations Bd. v. Modesto City Schools Dist.* (1982) 136 Cal.App.3d 881, 899; *City of Santa Rosa* (2013) PERB Decision No. 2308-M, p. 6, fn. 2; *Airflow Research & Mfg. Corp.* (1996) 320 NLRB 861.)

Two events trigger the appointment of a factfinding panel under MMBA: a written declaration of impasse from either party, and the exclusive representative's timely request for factfinding. Because of PERB's limited role under MMBA in determining the bona fides of an impasse declaration in the context of a factfinding request, in this case, it is incumbent on the employer to withdraw its declaration of impasse if it believes that circumstances have broken the impasse. Such a withdrawal would remove the necessary precondition for the appointment of a factfinding panel.[21]

Here, the City did not withdraw its declaration of impasse. Therefore, SEIU had the right to request factfinding and an obligation to do so within 30 days of the declaration. With the statutory and regulatory requirements satisfied, SEIU's request is not moot.

Constitutionality of AB 646

The City argues that the AB 646 factfinding process is unconstitutional, given the California Constitution's requirement that a County's governing body make such compensation and fiscal decisions without interference from either the Legislature or PERB. The City cites to *County of Riverside v. Superior Court* (2003) 30 Cal.4th 278 in support of its

[21] Any concerns that an employer is withdrawing a declaration of impasse in order to thwart factfinding or that an exclusive representative is engaging in piecemeal bargaining in an attempt to delay post-impasse implementation by the employer may be considered in the context of unfair practice proceedings.

argument. This argument was discussed in *Contra Costa, supra,* PERB Order No. Ad-410-M, and we need not repeat that discussion here, as we abide by our treatment of the matter in *Contra Costa.*

For all of these reasons, we affirm the administrative determination.

Request For Stay

Because we uphold the administrative determination, we deny the City's request to stay that administrative determination as moot.

ORDER

The administrative determination of the Public Employment Relations Board (PERB) Office of the General Counsel in Case No. SF-IM-145-M is hereby AFFIRMED. Service Employees International Union, Local 1021's request for factfinding satisfies the requirements of the Meyers-Milias-Brown Act section 3505.4 and PERB Regulation 32802(a) and the matter is REMANDED to the Office of the General Counsel for further processing pursuant to PERB Regulation 32804.

Chair Martinez and Member Banks joined in this Decision.

PUBLIC EMPLOYMENT RELATIONS BOARD

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August 5, 2014

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Re: *City & County of San Francisco (Fine Arts Museums) and Service Employees International Union Local 1021*
Case No. SF-IM-145-M
Administrative Determination

Dear Interested Parties:

On July 24, 2014, Service Employees International Union Local 1021 (SEIU or Union) filed a request for factfinding (Request) 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 the employer City and County of San Francisco, Fine Arts Museums (CCSF) have been unable to effect a settlement in their current negotiations over the impacts and effects of the CCSF's decision to implement a biometric time-keeping system.

On July 30, 2014, the CCSF filed a letter objecting to SEIU's request on the basis that: (1) it is "mooted" by CCSF's intervening offer to bargain; (2) the request concerns a non-negotiable issue; and (3) the request is improper because it concerns a single issue, as opposed to bargaining over an entire Memorandum of Understanding (MOU).

On July 31, 2014, SEIU filed a reply in opposition to CCSF's objections.

On July 31, 2014, PERB approved SEIU's request and informed the parties in an e-mail message that the determination would be subsequently memorialized in writing.

[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.

Summary of Facts

In or about May 2012, the CCSF notified SEIU of its intent to a implement a biometric time-keeping system (i.e., timeclocks using employee fingerprints). CCSF again provided notice to SEIU in March 2013.

CCSF and SEIU met and conferred over the effects of this implementation. SEIU initially identified privacy concerns as a negotiable effect. By letter dated July 11, 2014, SEIU representative David Canham sent Fine Arts Museums Human Resources Director Charlie Castillo a letter identifying the negotiable effect of employee discipline.

On July 16, 2014, Mr. Castillo sent an e-mail message to multiple recipients, including Mr. Canham, stating as follows:

> As outlined in my July 1, 2014 letter, the department has meet [sic] its obligation under the MMBA. The department and the City have met in good faith regarding all the issues outlined in Mr. Canham's letter going all the way back to 2012. We are at an impasse. Should you want to meet regarding any other issue that the Union may feel is unresolved, I would be amenable to a meeting.

On July 25, 2014, CCSF Employee Relations Director Martin Gran sent an e-mail message to multiple recipients, including SEIU representative Larry Bradshaw. Mr. Gran stated that meet and confer sessions over impacts of the biometric time clocks concluded in June 2013, that the Union raised additional impact issues in July 2014, and that the CCSF is available to meet to discuss these new issues. Further, the CCSF intends to implement the time clocks as to the Fine Arts Museums as of August 1, 2014.

Discussion

A. Declaration of Impasse

MMBA section 3505.4, subdivision (a),[2] 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

[2] 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, among other things, 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.)

> 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 be accompanied by a statement that the parties have been unable to effect a settlement. Such a request may be filed:
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> (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 a written notice of a declaration of impasse.

On July 16, 2014, Mr. Castillo provided SEIU representatives with a written notice of declaration of impasse. By Mr. Castillo's reference to his July 1, 2014, letter, it appears impasse was declared as to the ongoing effects bargaining sessions regarding CCSF's anticipated implementation of a biometric timekeeping system. The fact that, on July 25, 2014, the CCSF offered to meet further to discuss additional impacts, does not change the fact that CCSF provided a written declaration of impasse on July 16, 2014.

The instant request was filed on July 24, 2014, less than thirty days after the written notice of declaration of impasse. Therefore, it is timely.

B. Factfinding is Available for This Dispute

The Board has held in two recent decisions that the factfinding procedures set forth in MMBA sections 3505.4 through 3505.7 apply to bargaining disputes over all matters within the scope of representation, and that factfinding under the MMBA is not limited only to bargaining disputes over a comprehensive MOU.[3] (*County of Contra Costa* (2014) PERB Order No. Ad-

[3] These decisions also discuss the effect of the recent decisions in two Superior Court matters, *County of Riverside v. Public Employment Relations Board*, Super. Ct. Riverside County, 2013, Case No. 1305661, and *San Diego Housing Commission v. Public Employment Relations Board*, Super. Ct. San Diego, 2014, Case No. 37-2012-00087278. These matters are

410-M; *County of Fresno* (2014) PERB Order Ad-414-M.)[4] As discussed in *County of Contra Costa, supra*, PERB Order No. Ad-410-M, the duty to bargain includes the duty to negotiate over the implementation and foreseeable effects and impacts of managerial decisions not otherwise subject to the process of collective bargaining, such as layoffs, staffing levels, employee background checks, and additional educational programs. (*Claremont Police Officers Assn. v. City of Claremont* (2006) 39 Cal.4th 623; *International Assn. of Fire Fighters, Local 188 v. Public Employment Relations Bd.* (2011) 51 Cal.4th 259, 277; *Newman-Crows Landing Unified School District* (1982) PERB Decision No. 223; *Sutter County In-Home Supportive Services Public Authority* (2007) PERB Decision No. 1900-M; *Trustees of the California State University* (2012) PERB Decision No. 2287-H;.)

SEIU's request for factfinding identifies the type of dispute as "employer implementing bio metric time clocks and new basis of discipline." From related correspondence submitted by both parties it appears that the parties have been engaged in meeting and conferring regarding the effects of the employer's decision to use the new biometric timekeeping system. SEIU does not appear to contend that the decision itself is subject to the duty to bargain.[5] Under the Board's reasoning in *County of Contra Costa, supra*, PERB Order No. Ad-410-M and *County of Fresno, supra*, PERB Order Ad-414-M, the effects bargaining over this issue is subject to the MMBA's factfinding procedure. Even though the dispute is a so-called "single issue" dispute, as opposed to bargaining over a comprehensive MOU, the effects and impacts of the employer's decision appear to be a matter within the scope of representation. Accordingly, factfinding is appropriate.

Next Steps

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 type of "dispute" or "differences" to be examined at factfinding. At this stage of the proceedings, PERB's inquiry is complete.

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both presently on appeal, and therefore these decisions currently have no preclusive or precedential effect.

[4] On or about July 17, 2014, the County of Fresno filed a Petition for Writ of Mandate under Code of Civil Procedure section 1085, with the Superior Court for the County of Fresno, seeking to enjoin and declare invalid the Board's decision in *County of Fresno, supra*, PERB Order Ad-414-M. (*County of Fresno v. Public Employment Relations Bd.* (Super. Ct. Fresno County, 2014, Case No. 14CECG02042).)

[5] In *State of California (Department of Youth Authority)* (1998) PERB Decision No. 1293-S, the Board held that a decision to implement a check-in/check-out system is not negotiable, but that impacts of that decision may be subject to the duty to bargain.

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 August 12, 2014.[6] 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.[7] 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 August 12, 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

An appeal of this decision to the Board itself may be made within ten (10) calendar days following the date of service of this decision. (Cal. Code Regs., tit. 8, § 32360.) To be timely filed, the original and five (5) copies of any appeal must be filed with the Board itself at the following address:

Public Employment Relations Board
Attention: Appeals Assistant
1031 18th Street, Suite 200
Sacramento, CA 95811-4124
(916) 322-8231
FAX: (916) 327-7960

A document is considered "filed" when actually received during a regular PERB business day. (Cal. Code Regs., tit. 8, §§ 32135, subd. (a) and 32130; 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.)

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

[7] The seven neutrals whose résumés are being provided are Claude Ames, Norman Brand, Andrea Dooley, Ruth Glick, Robert Hirsch, Nancy Hutt, and John Kagel.

The appeal must state the specific issues of procedure, fact, law or rationale that are appealed and must state the grounds for the appeal (Cal. Code Regs., tit. 8, § 32360, subd. (c)). An appeal will not automatically prevent the Board from proceeding in this case. A party seeking a stay of any activity may file such a request with its administrative appeal, and must include all pertinent facts and justifications for the request (Cal. Code Regs., tit. 8, § 32370).

If a timely appeal is filed, any other party may file with the Board an original and five (5) copies of a response to the appeal within ten (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 on the San Francisco Regional Office. 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 an appeal or opposition to an appeal 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

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